The Legal Structure of Defense Organization

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Memorandum

prepared for the
President's Blue Ribbon Commission
on Defense Management

by
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and
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The views expressed in this memorandum are those of the authors. They do not necessarily reflect the views of any organization with which the authors have been or are currently associated.

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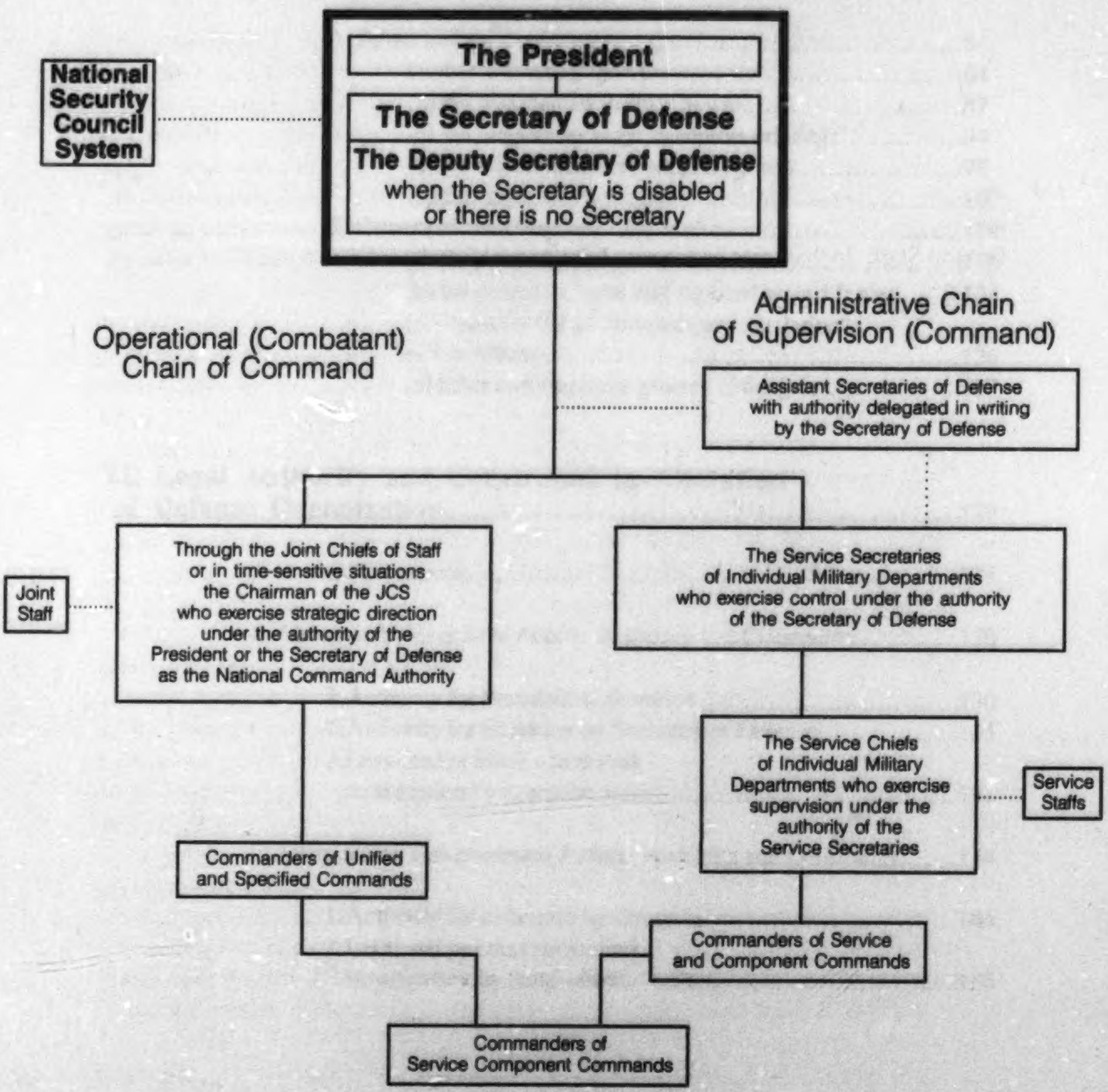
LEGAL STRUCTURE OF DEFENSE ORGANIZATION

(January 1986)

NATIONAL COMMAND AUTHORITY


National Security Council System
The President
The Secretary of Defense
The Deputy Secretary of Defense when the Secretary is disabled or there is no Secretary
Operational (Combatant) Chain of Command
Administrative Chain of Supervision (Command)
Assistant Secretaries of Defense with authority delegated in writing by the Secretary of Defense
Joint Staff
Through the Joint Chiefs of Staff or in time-sensitive situations the Chairman of the JCS who exercise strategic direction under the authority of the President or the Secretary of Defense as the National Command Authority
The Service Secretaries of Individual Military Departments who exercise control under the authority of the Secretary of Defense
The Service Chiefs of Individual Military Departments who exercise supervision under the authority of the Service Secretaries
Service Staffs
Commanders of Unified and Specified Commands
Commanders of Service and Component Commands
Commanders of Service Component Commands

I

EXECUTIVE SUMMARY

A.The History and Present Legal Structure of Defense Organization

Defense organization in nineteenth century America was characterized by uncertainty of command authority between successive Generals of the Army and Secretaries of War. That, and an absence of a General Staff in the War Department, as well as lack of coordination between the War and Navy Departments, led to confusion and inefficiency during the Spanish American War. The aftermath of that War saw an Act passed in 1903 under the leadership of Secretary of Defense Elihu Root that established the authority of the Secretary of War over the new Chief of Staff and established an Army General Staff. In that same year a new Joint Army-Navy Board was created to coordinate inter-service issues between the Departments of War and the Navy.

The successful Japanese surprise attack at Pearl Harbor and resulting congressional investigation, as well as the requirements of World War II to fight multi-theatre integrated land, sea and air battles, and the new and heightened defense risks of the post-War World led to a major defense reorganization in the National Security Act of 1947. That Act created what became in 1949 the Department of Defense, an umbrella organization, with separately organized Departments of the Army, Navy and Air Force. Based on the statutory description of service roles in the 1947 Act, in 1948 a more detailed "Functions Paper" was issued by the Secretary of Defense to clarify the roles of the Services. As subsequently modified and embodied in DOD Directive 5100.1, this "Functions Paper" has become the basis for inter-service agreement on roles and missions.

The structure of the 1947 Act has received significant amendment in 1949, 1953, 1958 and 1984. The 1949 amendments centered on strengthening the authority of the Secretary of Defense, particularly over the Service Secretaries, and created the positions of Deputy Secretary of Defense and Chairman of the Joint Chiefs of Staff as well as formally establishing the Department of Defense. The 1953 amendments created a position of General Counsel for the Department of Defense and somewhat strengthened the powers of the Secretary of Defense and the Chairman of the Joint Chiefs over the Joint Staff. The 1958 Amendments were the most important changes since the 1947 Act. Among other things they provided a clear statutory mandate for unified and specified commands, continued the consolidation in authority of the Secretary of Defense over the Defense Department, created a Director of Defense Research and Engineering, and strengthened the Organization of the Joint Chiefs of Staff. Most recently, the 1984 Amendments made certain changes intended to strengthened the voice of the operational commanders and to strengthen the professionalism of the Joint Staff.

The current legal structure of defense organization, based on constitutional authority, statute and Department of Defense directive, supports the current defense organization. Nevertheless, there are a number of legal issues the President's Blue Ribbon

Commission might want to consider in their examination of defense organization. These include:

- it might be useful to provide more general statutory authority--to match the probable constitutional authority--for the President and the Secretary of Defense to make general changes to defense organization during hostilities or imminent threat of hostilities[1];
- a major statutory provision concerning the authority of the Secretary of Defense to transfer combatant functions, that contains a one-house veto provision, is almost certainly unconstitutional, at least in part, under the recent Supreme Court decision in the *Chadha* case. As such, this issue must be recognized and a possible new provision drafted;
- it might be useful to strengthen the statutory charter of the Joint Chiefs with respect to their command function of strategic direction over operational commands (subject, of course, to the civilian direction of the President and the Secretary of Defense)[2];
- it might be useful to provide the Chairman of the Joint Chiefs a clearer statutory role in the operational chain of command for execution of the Single Integrated Operational Plan and other time-sensitive operations[3]; and
- it might be useful to seek to further clarify through statute, DOD Directive, or more informal means, specific functions that in the interest of effective unified combatant command should be considered "operational" as opposed to "administrative."

Changes in defense organization may be made by statute, or unless inconsistent with a constitutionally valid statute, by Executive Order or Department of Defense Directive. The Secretary of Defense has substantial authority to regulate and direct the activities of the Defense Department and all its components.

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[1] The president needs the authority to restructure the operational chain of command, at minimum during hostilities or periods of imminent involvement in hostilities. Whether Congress may constitutionally impose a particular command structure against the will of the President during "peacetime" is unclear. In view of the constitutional uncertainty in this area, the Commission might even want to consider whether a statutory provision granting presidential flexibility to reorganize during "wartime" might also permit such action if the President determines it to be "essential to the national security," or words to that effect.

[2] This memorandum on legal issues in current defense organization takes no position on whether the Chairman of the Joint Chiefs of Staff should be substituted for the Joint Chiefs in the operational chain of command. This recommendation is based on a felt need to clarify current law with respect to the present role of the Joint Chiefs in the operational chain of command.

[3] As with the previous recommendation, this recommendation is based on current law and current roles and is not a recommendation on the policy issue of whether the Chairman of the Joint Chiefs should be substituted for the Joint Chiefs in the operational chain of command.

B. The Constitutional Division of Power Between Congress and the President and the Authority to Alter Defense Organization

The constitutional framers were driven by conflicting objectives. On the one hand they were deeply fearful of standing armies, and the potential for abuse of unchecked military power. At the same time, they had experienced the gross inefficiency under the Articles of Confederation of leaving ultimate direction of military operations in the hands of the Continental Congress; and through their experiments in state government they had come to realize that legislative bodies, too, were prone to excesses if not properly checked.

Rather than compromise military effectiveness--which might jeopardize the existence of the new nation--the Founding Fathers vested the management of national security affairs exclusively in the hands of an independent Executive, but subjected this vast grant of power to strong checks by the legislature. As Commander-in-Chief the President was supreme in deciding strategic and tactical matters concerning the employment of military force; except that he could not initiate a "war" without the formal approval of both houses of Congress, and Congress had total discretion to decide on the size and nature of the military force given to the President. As a specific safeguard against Executive abuse, funds for the army could not be appropriated for more than a period of two years at a time.

The records of the constitutional convention, the state ratification debates, the *Federalist* papers, and the practice under the Constitution while many of its authors were serving in the government, all suggest that Congress was not expected to be knowledgeable about military matters or the often secret details of military planning. It was not the expected function of Congress to "micro-manage" or "second guess" the military decisions of the President; but rather to watch vigilantly and, if necessary, to use its ultimate control over the purse strings to prevent abuse.

In addition to the critical function of guarding against abuse, Congress was given its power to "raise and support" armed forces as a part of its responsibilities for resource allocation. It appears to have been the expectation that the President would determine the military needs for safeguarding the nation--in terms of manpower, equipment, fortifications, and the like--and then present a request to Congress for its consideration. While as an ultimate check against abuse Congress had the power to completely rewrite such a request, the early practice suggests that the Founding Fathers viewed the congressional role largely as a "veto" power--concluding that certain proposed expenditures were too burdensome on the taxpayers, or that others were unwise or unnecessary for other reasons.

Both because of a realization that, unlike domestic matters, the control of foreign and military affairs were vested exclusively in the President; and because of its own lack of technical expertise; Congress tended to be deferential to the President in these areas. It was recognized that such matters were influenced greatly by the acts of foreign States, and that Congress lacked both the secrecy and dispatch necessary to manage them. Legislation on national security matters tended to allow far more Executive discretion than would have been permitted on domestic affairs. Even when constraints were enacted to limit the President, they often provided that during "time of war" the President would have far greater discretion. In the absence of such provisions, similar flexibility was generally provided upon the occurrence of war by the enactment of new legislation.

Historically, the President and the Secretaries of War and the Navy have been given broad authority to organize their military forces as they deemed most effective to meet the perceived threats. While under the Constitution the power to "make rules for the government and regulation of the land and naval forces" was expressly vested in Congress, the general practice was to seek recommendations from the Executive branch and then codify these--with perhaps a few modifications. Not infrequently, a set of regulations already promulgated by departmental directive would be enacted into law by reference--even including therein, on occasion, a provision that future such regulations issued by the Secretary of War or Secretary of the Navy would automatically have legal effect.

Congress obviously has the constitutional authority to impose many of its own preferences upon the President with respect to military organization. The power of Congress to regulate the organization of the military is broad, and extends to encompass virtually everything that is not forbidden by some other provision of the Constitution. But because the Constitution expressly makes the President the "Commander-in-Chief," there are serious limits on how far Congress may properly go in detailing the operational "chain of command" used by the President to employ whatever military force Congress in its wisdom provides. While the precise limits in this area remain undefined, it is beyond serious question that Congress may not deprive the President of the supreme command by placing anyone above him or by creating any military element which is not subject to his ultimate command. In addition, the underlying principles suggest that--despite the constitutional power of Congress to create "offices," and the power of the Senate to "advise and consent" to appointments--the President should be free to select his own channels for issuing commands to the combat forces at his disposal, and to organize the command structure as he deems necessary to conduct the military operations for which he is ultimately responsible under the Constitution. Since the constitutional text is vague, and there has been little litigation to provide opportunities for clarification by the courts, this judgment must be viewed as educated speculation. There are no doubt others who would disagree with it.

One of the reasons there has been little litigation in this area is because throughout our history there has been a general recognition that successful national security policies require the cooperation of both Congress and the President. There have been a few periods during which Congress has sought to "tie the hands" of the President in this area--most notably the Reconstruction period following the Civil War, and the "Watergate" period following the Vietnam conflict--but in general Congress has recognized that the President must have flexibility, and presidents have recognized that in the long run military policies can't succeed without the approval of Congress. The traditional practice has been for the President and Congress to cooperate in a bipartisan manner during crisis to defeat the common threat.

As Commander-in-Chief the President has substantial authority to organize the military placed at his command. Some of this is implied from his Commander-in-Chief power and is thus independent, and some is concurrent power subject to constraint should Congress by legislation wish to limit it. Most of this authority may be delegated to the Secretary of Defense, who may then issue regulations. In addition, both the President and the Secretary of Defense are given very broad powers by statute to organize the military forces under their command. Many of the restrictions that do exist on this authority cease to operate, by their own provisions, during wartime.

It needs to be kept in mind that the world has changed dramatically in the last few decades, and the need for organizational flexibility in the American defense establishment has not been immune to those changes. A century ago--or even a few decades ago--it was possible for Congress to establish a set of detailed rules for "peacetime," with a provision that during a crisis these could be modified at the discretion of the President. It is not clear that the United States will have weeks or months to prepare for a future war. In an era of intercontinental strategic missiles and space-based systems, it is likely that any future major war will be a "come as you are" affair, in which even preexisting presidential discretion to reorganize during "wartime" could provide but an illusory flexibility.

Congress has the exclusive power of deciding whether there shall be an army, and if so of what elements it shall consist. But once an army is created, it becomes the exclusive responsibility of the President to deploy and employ that force to deter--and when necessary, defeat--an enemy. The organizational structure through which he issues his commands to that force is so closely related to the supreme command authority itself, that Congress should for both constitutional and prudential reasons provide flexibility to the President to alter the command structure. At minimum, there should be a provision permitting an across-the-board presidential flexibility in settings of hostilities or imminent threat thereof. Because of the uncertainty as to the scope of presidential and congressional powers in this area, the absence of such a provision could precipitate a constitutional confrontation during ongoing hostilities--at a time when the nation could least afford it.

II

INTRODUCTION AND SCOPE OF STUDY

Optimum organization for national defense was a subject of concern to the framers of the American Constitution and has been an enduring concern throughout American history. In the aftermath of the surprise attack at Pearl Harbor, the global warfare of World War II, and the new age of thermonuclear weapons, intercontinental ballistic missiles and sustained low-intensity conflict, efficient defense organization has become of vital importance to our survival as a free nation.

The President's Blue Ribbon Commission on Defense Management, established by Executive Order 12526 of July 15, 1985, has as one of its mandates to study and make recommendations concerning defense organization, particularly "the organizational and operational arrangements, both formal and informal, among the Office of the Secretary of Defense, Organization of the Joint Chiefs of Staff, the Unified and Specified Command system, the Military Departments, and the Congress."[1] This memorandum has been prepared in aid of that mandate. Pursuant to the tasking request of November 25, 1984 it is a two-part memorandum that seeks to provide an objective analysis of "(A) the legal history and present legal status of defense organization, including the Office of the Secretary of Defense, the Chairman and the Organization of the Joint Chiefs of Staff, the Unified and Specified Command System and the Military Departments; and (B) constitutional issues concerning the respective roles and powers of the Executive Branch and the Congress."

In implementing the tasking request, this memorandum is organized into eight sections. Section I is an Executive Summary organized in two parts to parallel the two-part tasking request. Section II provides an introduction to the memorandum and a discussion of its scope. Section III provides an overview history of defense organization with principal attention to the National Security Act of 1947 and subsequent amendments. Section IV discusses the present legal structure of defense organization. It provides a general overview of current defense organization, then discusses the specific legal status of defense organization components such as the Office of the Secretary of Defense, the Joint

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[1] 50 FEDERAL REGISTER 138, Presidential Documents 29203-04 (July 18, 1985). The mandate of the Blue Ribbon Commission relevant to defense organization specifically includes authority to: "Review the adequacy of the current authority and control of the Secretary of Defense in the oversight of the Military Departments, and the efficiency of the decisionmaking apparatus of the Office of the Secretary of Defense; 3. Review the responsibilities of the Organization of the Joint Chiefs of Staff in providing for joint military advice and force development within a resource-constrained environment; 4. Review the adequacy of the Unified and Specified Command system in providing for the effective planning for and use of military forces; 5. Consider the value and continued role of intervening layers of command on the direction and control of military forces in peace and in war; 6. Review the procedures for developing and fielding military systems incorporating new technologies in a timely fashion; 7. Study and make recommendations concerning congressional oversight and investigative procedures relating to the Department of Defense; and 8. Recommend how to improve the effectiveness and stability of resources allocation for defense, including the legislative process. (c) In formulating its recommendations to the President, the Commission shall consider the appropriate means for implementing its recommendations. . . ."

Chiefs of Staff, and the unified and specified command system and concludes with a functional analysis of selected contemporary issues such as the authority of operational commanders. Section V provides a general constitutional review of the division of power between the Congress and the President relevant to defense organization and modes of modifying that organization. Section VI more specifically applies this discussion to the authority of and constraints on Congress and the President in modifying defense organization. Section VII provides a conclusion again divided by reference to the two-part tasking request.

Sections I(A), III, IV, and VII(A) of this memorandum generally reflect task A concerned with an objective statement of the "legal history and present legal status of defense organization" and Sections I(B), V, VI, and VII(B) of this memorandum generally reflect task B concerned with an objective statement of "constitutional issues concerning the respective roles and powers of the Executive Branch and the Congress."

In describing the legal structure of defense organization this memorandum focuses on the Department of Defense and the Organization of the Joint Chiefs of Staff; more specifically on the four principal divisions of the Department of Defense: the Office of the Secretary of Defense (OSD), the Organization of the Joint Chiefs of Staff (OJCS), the Military Departments, and the Operational Commands. It does not focus on budgeting, fiscal management and the appropriations process within the national security process; important issues examined elsewhere by the Blue Ribbon Commission. Similarly, it does not discuss the National Security Council system, including the White House crises action system (except briefly to examine OJCS participation), the Central Intelligence Agency, the Office of Director of Central Intelligence, the White House intelligence oversight systems, the foreign policy and national security functions of the Department of State and American embassies abroad, the Arms Control and Disarmament Agency, the internal security system including the roles of the Justice Department and the Federal Bureau of Investigation, the detailed organization and roles of the Congress in national security decisions, or the myriad of other organizations, governmental and otherwise, that collectively constitute the national security process of the United States. For an overview of this broader process, see J. Moore, F. Tipson & R. Turner, *Law and National Security*.[2]

In dealing with the subject of defense organization, and particularly the organization of operational command, the reader should be aware that there is a considerable amount of conceptual and terminological ambiguity. This is particularly the case in the concept of a "general staff," which seems to carry a wide variety of nuanced meanings, and the concept of "command."

The concept of "general staff" has been used to refer to such a diversity of staff organization as a "collection of War Department administrative and logistical bureau chiefs," "a small administrative staff with ...[no] systematic responsibility to support a commander in the planning and conduct of actual combat operations," a more modern "staff organization designed to assist military commanders in the conduct of actual military operations," and such a modern staff organization built of a professional elite as in the pre-World War II German General Staff.[3] Because of this ambiguity, it is important to clarify with precision how this term is being used and in interpreting the intent of Congress to be aware of the underlying functional concerns of Congress in use of this terminology. Recurrent functional concerns of Congress in use of this terminology seem to relate to the importance of civilian control of the military, a preference for retention of a substantial (though not precisely defined) role for the military departments, and possibly a preference for enhanced field authority in command.

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[2] In manuscript and available from the Center for Law and National Security, University of Virginia School of Law. This memorandum has also not dealt with the legal structure of the National Guard. See generally Title 32 of the United States Code.

Similarly, the concept of "command" historically has been used in many different senses. For example, at least one scholar on the legal history of defense organization has described an ambiguity about the meaning of "command" as contributing to constant friction from 1828-1903 between the Secretary of War and the General of the Army.[4] The ambiguity here was, in fact, the rather substantial ambiguity as to whether the General of the Army was subject to the orders of the Secretary of War. The issue was resolved for the War Department by the recommendation of Secretary of War Elihu Root, embodied in an Act of Congress of February 14, 1903, clarifying that the Secretary of War had *command* by delegation from the President and that the "Chief of Staff is charged with *supervising* under the direction of the Secretary of War, all troops of the line...."[5] This issue, of course, is not really about whether the Chief of Staff had operational command but about whether that command was only exercised pursuant to and was subordinate to the command of the President as Commander-in-Chief through the Secretary of War. The historic friction on this important issue in the War Department, and Secretary Root's statutory fix, may be the historic explanation as to why modern command statutes concerning the Army Chief of Staff have used the language "supervision" but similar statutes for the Chief of Naval Operations and the Chief of Staff of the Air Force used the language to "command" until changed by statute in 1958. A modern ambiguity concerns the line to be drawn between "full operational command" in the unified and specified commands and the role of the military departments in administrative matters concerning component forces. This has emerged as a central issue in the contemporary discussion of defense organization.[6] As with other conceptual ambiguities, the only solution would seem to be careful specificity of precise meaning and functional differentiation of included issues concealed by such general terminology.

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[3] See the study on this subject prepared by Robert L. Goldich of the Congressional Research Service, Goldich, *The Evolution of Congressional Attitudes Toward a General Staff in the 20th Century* , (Aug. 30, 1985) reprinted in DEFENSE ORGANIZATION: THE NEED FOR CHANGE, STAFF REPORT TO THE COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE 244-74 (Oct. 16, 1985) (Sometimes referred to as the *Locher Report* in reference to the name of the Study Director, James R. Locher III).

[4] A. KING, THE COMMAND OF THE ARMY: A LEGAL AND HISTORICAL STUDY OF THE RELATIONS OF THE PRESIDENT, THE SECRETARIES OF WAR AND THE ARMY, THE GENERAL OF THE ARMY, AND THE CHIEF OF STAFF, WITH ONE ANOTHER 52-93 (1960).

[5] *Id.* at 65-66. (emphasis added).

[6] See, e.g., the *Locher Report* , *supra* note 3; A. BARRETT, REAPPRAISING DEFENSE ORGANIZATION (1983); J. CUSHMAN, COMMAND AND CONTROL OF THEATER FORCES: THE KOREA COMMAND AND OTHER CASES (1985).

It should also be pointed out that the law of defense organization is overwhelmingly rooted in the Constitution, statutes and Department of Defense directives and practice. Unlike many other areas of the law, the judiciary has played almost no role in formulating the law.[7] This is no doubt in part because of the "passive virtues" of "political-question", "ripeness", and "mootness" exercised by the courts in national security settings.[8] This absence of judicial review, however, may also in large measure result from any ambiguities in the legal structure being fought out and clarified within the defense organization rather than being referred to the courts. Whatever the reason, this pattern of pragmatic legislative and administrative resolution would seem appropriate for these highly specialized and political defense issues.

This memorandum is intended to be an objective legal analysis of defense organization. As with any legal analysis it discusses issues that may in substantial part also be policy issues. Its purpose, however, is not to provide a policy analysis of the many defense organization issues before the Commission--and it does not do so. Discussion or omission of particular policy issues should not be construed as policy support or opposition with respect to any such issue apart from the legal analysis provided.

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[7] See generally P. WALLACE, MILITARY COMMAND AUTHORITY: CONSTITUTIONAL, STATUTORY, AND REGULATORY BASES 13-18 (1983).

[8] See generally *The Justiciability of Challenges to the Use of Military force Abroad*, chapter in J. MOORE, LAW AND THE INDO-CHINA WAR (1972); *Gilligan v. Morgan*, 413 U.S. 1 (1972) (declining to review the pattern of training, weaponry and orders in the Ohio National Guard surrounding the civil disorders at Kent State University on Oct. 15, 1970).

III

AN OVERVIEW HISTORY OF DEFENSE ORGANIZATION

A. The Early Period Through World War II

The first Congress of the United States established in 1789 an Executive Department denominated the Department of War. Nine years later, in 1798, the fifth Congress established an Executive Department denominated the Department of the Navy. These early acts created a Secretary for the Department of War and a Secretary of the Navy to execute such duties and orders as given by the President. The structure which they created of separate departments for the army and the navy remained as the basic defense organization down to--and in some senses through--World War II.

In these early years Congress passed numerous acts related to defense organization even though none so sweepingly altered defense organization as the National Security Act of 1947 and its subsequent changes. For example, by act of March 3, 1815 Congress reduced the number of major generals from six as authorized for the War of 1812 to two. By act of March 2, 1821 it further reduced the number of major generals to one and brigadier generals to two. At the beginning of the Mexican War in 1846 Congress authorized three additional major generals for the War but in 1848 specified that the number of officers in that grade should be reduced by attrition to one.[1] An act of February 29, 1864 revived the grade of lieutenant-general and provided that the appointee to that grade "may be authorized under the direction, and during the pleasure of the President, to command the armies of the United States." General Ulysses S. Grant was appointed to this position and confirmed by the Senate. An act of March 2, 1867, widely regarded by modern commentators as unconstitutional, and passed at the height of the reconstruction Congress battle with President Johnson, sought to tie the hands of the President and make General Grant sole commander of the army. Among other restrictions on the President this act provided: "[t]he General of the army shall not be removed, suspended or relieved from command, or assigned to duty elsewhere than at said headquarters [in Washington], except at his own request, without the previous approval of the Senate...."[2]

At least one scholar has characterized the period from 1828-1903 as a period of "constant friction" in defense organization.[3] This included periodic friction between successive Secretaries of War and Generals of the Army, as well as lack of coordination, and even antagonism, between the War and Navy Departments. Thus, the Spanish-American War in 1898 was marked by extreme lack of coordination between the Army and the Navy as well as a severe lack of planning and logistics in the War Department and friction between the General of the Army and the Secretary of War.[4] The hard-learned lessons of the Spanish-American War soon gave rise to significant reform in clarity of the command structure, centralized planning, and inter-service coordination.

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[1] See generally ARCHIBALD KING, THE COMMAND OF THE ARMY: A LEGAL AND HISTORICAL STUDY OF THE RELATIONSHIPS OF THE PRESIDENT, THE SECRETARIES OF WAR AND THE ARMY, THE GENERAL OF THE ARMY, AND THE CHIEF OF STAFF, WITH ONE ANOTHER 8 (1960).

[2] *Id.* at 14.

[3] *Id.* at vii.

Although Attorney General Cushing had issued an opinion in 1855 to the effect that "the direction of the President is to be presumed" in all instructions and orders from the Secretary of War,[5] the recurrent dispute about command authority between a succession of Secretaries of War and Generals of the Army was not resolved until the Elihu Root inspired act of February 14, 1903, creating for the Army a General Staff Corps and a Chief of Staff. That act, consistent with the 1855 opinion of the Attorney General, made clear that the Secretary of War had command authority by delegation from the President and that the Army Chief of Staff exercised "supervision" of the line officers pursuant to these instructions of the President passed through the Secretary of War.[6] It also remedied the lack of an Army general staff so evident in the lack of planning for the Spanish-American War.

The year 1903 also saw a significant step to improve coordination between the War and Navy Departments in the creation of the Joint Army-Navy Board. That Board, created by a common order signed by the Secretaries of War and the Navy, remained the principal mechanism of inter-service coordination down to World War II. It consisted of four senior officers from each service and sought to address "all matters calling for the cooperation of the two services."[7] A product of the Board, a continuing agreement "Joint Action of the Army and Navy (JAAN)," in 1925 described "paramount interest" as determinative of joint action responsibility. At the time of Pearl Harbor this JAAN doctrine had become merely "mutual cooperation" in joint actions.[8] A conviction that lack of inter-service coordination was one factor that contributed to the disaster at Pearl Harbor, as well as the enormously increased demand for inter-service coordination during World War II and the post-war climate, were factors contributing to the reorganization of the Army and Navy under a single "military establishment" in the National Security Act of 1947.

On the eve of America's participation in World War I, Congress passed the National Defense Act of 1916 which, among other things, dealt with the selection and operation of the General Staff Corps. According to Colonel Archibald King, a legal expert in the history of organization of the Army and a member of the group that drafted the subsequent Army Organization Act of 1950:

> When it enacted the National Defense Act [of 1916], Congress intended that the Chief of Staff should *not* be a Commanding General, but

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[4] *Id.* at 39-50.

[5] 7 Ops. Atty Gen. 453, 482 (1855), cited in A. King, *supra* note 1, at 5.

[6] King, *supra* note 1, at 59-69.

[7] See 1 V. DAVIS, ORIGIN OF THE JOINT AND COMBINED CHIEFS OF STAFF: ORGANIZATIONAL DEVELOPMENT, 1-7 (Joint Chiefs of Staff, Joint Secretariat 1972).

[8] See J. CUSHMAN, COMMAND AND CONTROL OF THEATER FORCES: THE KOREA COMMAND AND OTHER CASES 4-5 (1985).

> that he and the General Staff should be limited to staff duties of a general nature not pertaining to any of the staff departments then existing.[9]

From the passage of the National Defense Act of 1916 to the passage of the National Security Act of 1947 there was a succession of acts of Congress and executive orders dealing with the duties of the Army Chief of Staff, the organization of the General Staff, and the organization of Assistant and Under Secretaries of War.[10] Of particular interest, in 1918 during World War I, and again in 1941, only eleven days after the attack on Pearl Harbor brought the United States into World War II, Congress passed general acts authorizing the President to redistribute functions and reorganize defense organization at his discretion during the course of the War.[11] This authority was immediately exercised by President Roosevelt on February 28, 1942 in an Executive Order substantially reorganizing the Army. Among other things Roosevelt's order created an Air Force within the Army, formal recognition of the predecessor to the Air Force as a separate military department as established by the National Security Act of 1947.[12]

During World War II, pursuant to his general constitutional and statutory powers, but without specific statute or formal executive order, President Roosevelt created a Chief of Staff to the President, an informal organization of the Joint Chiefs of Staff, and unified commands in several theaters and operations.[13] The Chiefs of Staff were apparently first created as a result of an agreement between Churchill and Roosevelt in December of 1941 to establish a U.S.-British Combined Chiefs of Staff that would bring together their American counterparts for the Navy, Army and Air Force with the three British Service Chiefs. The three United States members of this Combined Chiefs of Staff took on the name of the Joint Chiefs of Staff. The Joint Chiefs assumed the functions of the old Joint Army-Navy Board and within six months they had acquired a small Joint Secretariat.[14] Prior to the National Security Act of 1947, this full time Joint Staff had grown to almost a hundred full time persons with a substantial part time contingent operating through a network of formal and informal committees.

The disaster at Pearl Harbor and subsequent full Congressional investigation, the requirements of global combined multi-theater operations during World War II, and the advent of the atomic age, led to the most sweeping defense reorganization in American history in the immediate post war period. That reorganization, mandated by the National Security Act of 1947, would lead to four more significant revisions from 1947 to the present.

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[9] King, *supra* note 1, at 71.

[10] For a detailed examination of these acts of Congress and executive orders, see generally *id.* at 71-93. (This brief history of the early period of defense organization deals more completely with the Army than the Navy because of the excellent legal history written on command of the Army by Colonel King.)

[11] It is quite possible, if not probable, that the President already has this power during ongoing hostilities pursuant to his constitutional power as Commander-in-Chief. See the discussion in section V of this memorandum.

[12] See King, *supra* note 1, at 73, 85-86.

[13] *Id.* at 116. Colonel King says of these Roosevelt actions: "The President as Commander in Chief may, without statutory authority, detail any officer of the armed services to any duty of a military nature. It was therefore entirely lawful for the President to detail Admiral Leahy to be his Chief of Staff and to make the other orders and dispositions mentioned." *id.*

[14] See J. CUSHMAN, *supra* note 8, at 14-12 to 14-13.

B. The National Security Act of 1947 and Subsequent Changes

1. The National Security Act of 1947

World War II, and its immediate aftermath, taught the United States a number of important national security lessons and posed new challenges for the future. First, we had learned the importance of unified combatant commands integrating land, sea and air forces on a multi-theater basis. Second, the Nation realized the great importance of industrial mobilization and national preparedness in a comprehensive sense. Third, there was widespread understanding of the great importance of intelligence and the necessity of a well-integrated national intelligence effort. Fourth, the development of nuclear weapons and rapid technological advances in aircraft and missile design demonstrated dramatically the importance of vigorous defense research and development. Fifth, the linkage between national defense policy and foreign policy, as well as other aspects of national policy, became much more pronounced in the accelerated political-military environment of the prosecution of the war and the early years of the cold war. And finally, among many other lessons, it was understood that future national security organization must be responsive on a time urgent basis as the nation faced a continuing risk, even if of a low probability of occurrence, of a nuclear surprise attack. These factors led to passage of the National Security Act of 1947, a sweeping reorganization of the national defense structure.[15] The June 5, 1947 Report of the Senate Committee on Armed Services is illustrative as to the underlying reasons for the 1947 Act:

> World War II crowned the American effort with overwhelming success. At the same time, the projection of this vast effort into almost every field of civil and governmental endeavor disclosed certain fundamental weaknesses in our security structure which should be remedied while their details are fresh in mind. For instance, our slow and costly mobilization, our limited intelligence of the designs and capacities of our enemies, our incomplete integration of political purpose and military objectives, and finally, our prodigal use of resources, all demonstrate convincingly that our national existence would be imperiled were we to ignore the costly lessons of war and fail to reorganize our national security structure so as to prevent the recurrence of these defects.

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[15] The Historical Office of the Office of the Secretary of Defense has prepared an excellent historical study of defense reorganization from 1944-1978. See OFFICE OF THE SECRETARY OF DEFENSE HISTORICAL OFFICE, THE DEPARTMENT OF DEFENSE: DOCUMENTS ON ESTABLISHMENT AND ORGANIZATION 1944-78 (1978).

> In looking to the future, it is apparent, from the potentialities implicit in scientific development, that the world is entering an era in which war, if it comes, will be fought at speeds and accompanied by devastations that stagger the imagination. Consequently, in order at once to guard our safety and support our efforts to promote and maintain the peace of the world, it is essential that this country move without delay to provide itself with the best organization for security which can be devised.[16]

A central debate incident to development and passage of the 1947 Act was the modality of unifying organization within the military establishment. In a series of Congressional hearings in April-May 1944, October-December 1945, and April-July 1946, the Army and Navy agreed in principle to the need for a unifying organization but disagreed as to scope, composition and functions of such an organization. The War Department, supported by an April 1945 report of a majority of a special Committee of the Joint Chiefs, favored a single department of armed forces . The Navy, supported by a September 1945 report prepared at the request of the Navy Department (called the Eberstadt Report), stressed the need for civil-military coordination but opposed establishment of a single department of armed forces. The War Department and the Navy Department each prepared and presented separate plans to the Congress. Differences between the Departments were sharpened by November 1946 to the nature of the unifying organization for national security, the delineation of the functions of the armed services, and the organization for unified command in the field. In a series of agreements on November 12, 1946 and January 16, 1947, the latter of which was embodied in a joint letter to the President from Secretary of War Patterson and Secretary of the Navy Forrestal, the two Departments reached agreement--including agreement on legislation providing for a Secretary of Defense exercising general direction over three separately administered War, Navy and Air Departments. That general agreement paved the way for the 1947 Act. On November 12, 1946, with the approval of the President, a Joint Chiefs of Staff directive was issued embodying an agreement on unified armed services. And pursuant to the January 16th letter, an Executive Order setting forth the roles and missions of the armed forces was to be released simultaneously with the new legislation[17] .

After lengthy hearings and debate, the Congress approved the National Security Act of 1947 on June 26, 1947. As enacted, the Act did the following things:

> First, it created a National Security Council to advise the President with respect to the integration of domestic, foreign and military policies. Members of the Council were the President, the Secretary of State, the Secretary of Defense, the Secretaries of the Army, Navy and Air Force, the Chairman of the National Security Resources Board, and a number of others to be named at the direction of the President, including the Secretaries of the executive departments.

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[16] U.S. Senate, Committee on Armed Services, Senate Report No. 239, June 5, 1947, in U.S. CONGRESSIONAL SERVICE 47-94 at 1488-89.

[17] *Id.* at 1489-93.

Second, it created a Central Intelligence Agency under the National Security Council to coordinate intelligence activities of the government.

Third, it created a National Security Resources Board to advise the President on the coordination of military, industrial and civilian mobilization.

These three coordinating mechanisms were established in Title I of the Act.

Fourth, the Act reorganized the military establishment. This reorganization included:

- it created a National Military Establishment with a Secretary of Defense as head thereof;
- it provided a statutory charter for military and civilian personnel to be assigned to the Secretary of Defense, but it also provided that "he shall not establish a military staff" and that the number of civilian assistants shall not exceed three;
- it created a separate Department of the Air Force and renamed the War Department the Department of the Army;
- it provided a statutory charter for the functions of the Army, Navy, Air Force, and Marine Corps;
- it created a War Council within the National Military establishment composed of the Secretary of Defense, as Chairman with the power of decision, the Secretaries of the Army, Navy, and Air Force, and the Chiefs of Staff of the Army, Navy, and Air Force;
- it provided a statutory charter for the Joint Chiefs of Staff which were to continue to operate on the basis of cooperation;
- it provided a statutory charter for the Joint Staff not to exceed one hundred officers; and
- it created a Munitions Board and a Research and Development Board to coordinate and advise on defense procurement, research and development.

The new Secretary of Defense was given power to "[e]stablish general policies and programs for the National Military Establishment and for all of the departments and agencies therein" and to "[e]xercise general direction, authority, and control over such departments and agencies...." The Service Secretaries, however, retained cabinet status, were full members of the National Security Council, and had a statutory right to make any report or recommendation to the President or the Director of the Budget after first informing the Secretary of Defense.

The Joint Chiefs were charged with the duty, among others, subject to the authority and direction of the President and the Secretary of Defense, "to establish unified commands in strategic areas when such unified commands are in the interest of national security." Pursuant to this authority a number of unified commands were created and directed through an executive agent system whereby one of the service chiefs was designated an executive agent for supervision of each such command.

The 1947 Act reflected considerable concern to ensure that control of the national defense community would remain under civilian leadership. Thus, the director of the National Security Council was to be a "civilian executive secretary," and no person who had "within ten years been on active duty or a commissioned officer in a Regular component of the armed services shall...be eligible for appointment as Secretary of Defense."

The 1947 Act also set out an important statement of Congressional purpose "to provide for...authoritative coordination and unified direction under civilian control [of the three military departments] but not to merge them...." and "to provide for the effective strategic direction of the armed forces and for their operation under unified control for their integration into an efficient team of land, naval, and air forces." The resulting structure separated operational command of unified commands from administrative control which continued to be administered by the Military Departments.

During the discussions leading up to the National Security Act of 1947 the allocation of functions between the services, between the services and the operational commands, and between the services and the Joint Chiefs of Staff, were central to organizational differences and ultimately agreement. The joint letter of January 16, 1947 from Secretary of War Patterson and Secretary of the Navy Forrestal recommended to President Truman an Executive Order to be issued simultaneously with the expected legislation setting forth the functions of the armed services. When President Truman transmitted his proposed unification bill to Congress, he indicated his intention to issue such an Executive Order on passage of the legislation. Congress debated including service missions in the legislation, and did include general statements of function of each of the services. President Truman issued Executive Order 9877 on "functions of the armed forces" the same day that he signed the National Security Act of 1947. Almost immediately, the differences between the language of the act and the Executive Order came into question. To resolve these differences Secretary of Defense James Forrestal proposed a redraft of Executive Order 9877 and on January 20, 1948 circulated it for comment to the Military Departments and the Joint Chiefs. The Joint Chiefs were unable to reach agreement on the text of a new order and requested that remaining differences be "resolved by higher authority." Pursuant to that request the Secretary of Defense met with the Joint Chiefs at Key West, Florida from March 11-14, 1948. An agreement reached at that meeting and approved "by direction of the President" on "Functions of the Armed Services and the Joint Chiefs of Staff," was promulgated by Secretary of Defense Forrestal on April 21, 1948 and is frequently referred to as "the Key West Agreement" or the "Functions Paper." At the request of the Secretary of Defense this agreement replaced Executive Order 9877 that was cancelled on April 21, 1948 by Executive Order 9950. Subsequent service differences concerning command arrangements in August 1948 were resolved at a meeting between the Secretary of Defense, the Secretaries of the Military Departments and the Joint Chiefs at Newport, Rhode Island from August 20-22. The supplemental agreements reached at the meeting were incorporated as a supplement of August 23, 1948 to the "Functions Paper." [18]

2. National Security Act Amendments of 1949

The National Security Act of 1947 was a compromise between those who had pushed for stronger centralization and unification of function within the military departments and those who had sought to maintain greater autonomy of the departments. Although under the 1947 Act the Secretary of Defense seemed clearly in charge over the Service Secretaries and Military Departments, there was lingering concern that some of the structure and language of the Act did not reflect the clear authority and direction of the Secretary over the military establishment. In his first Annual Report the Secretary of Defense recommended change in the 1947 Act. And in 1948 and 1949 outside groups such as the Eberstadt Task Force of the Hoover Commission made recommendations for change.[19] On March 5, 1949 President Truman recommended to the Congress certain amendments of the Act centered on strengthening the role of the Secretary of Defense but also making certain other changes. As enacted in the National Security Act Amendments of 1949, these included:

- the composition of the National Security Council was changed to add the Vice President and delete the Service Secretaries;
- the National Military Establishment umbrella organization was changed into the Department of Defense and made an Executive Department;
- the three military departments were downgraded from executive departments to military departments within the Department of Defense. Along with this change the three Service Secretaries lost their cabinet status;
- the mandate of the Secretary of Defense was strengthened to "direction, authority, and control over the Department of Defense";
- a Deputy Secretary of Defense was created who "shall act for, and exercise the power of the Secretary of Defense during his absence or disability";
- three positions of Assistant Secretary of Defense were created;
- the language restricting the Secretary of Defense from having a "military staff" was altered to reflect the advisory role of the Joint Chiefs to the Secretary;

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[18] For a good history of this "Functions Paper" issue see OFFICE OF THE SECRETARY OF DEFENSE, *supra* note 15, at 2267-93. For a discussion of the origins and development of the "Functions Paper" see Historical Division of the Joint Secretariat of the Joint Chiefs of Staff, "The Statutory Responsibilities of the Joint Chiefs of Staff" (Unpublished paper of January 12, 1983). For a discussion of the significance and operation of the National Security Act of 1947 see Lee, *The Organization for National Security*, 1949 PUB. ADMIN. REV. 36 (No. 1, Winter 1949).

[19] See HISTORICAL OFFICE, *supra* note 15, at 60-77.

- the position of Chairman of the Joint Chiefs was created, without vote and with duties that included:
  - serving as presiding officer of the Joint Chiefs;
  - providing an agenda for Joint Chiefs meetings and assisting them to prosecute their business as promptly as practicable; and
  - informing the Secretary of Defense, and when appropriate "as determined by the President or the Secretary of Defense, informing the President of those issues on which agreement has not been reached";
- the size of the Joint Staff was increased from 100 to 210 officers;
- the Secretary of Defense was required to report semi-annually rather than annually to the President and Congress on the work of the Department; and
- the Munitions Board and the Research and Development Board were made clearly subservient to the Secretary of Defense.

Because of the apparent strengthening of the functions of the Secretary of Defense, Congress sought to ensure that the military services would not be merged and specifically prohibited the Secretary of Defense from transferring, reassigning, abolishing or consolidating Military Departments and limited the Secretary in transfer of non-combatant functions "until after a report in regard to all pertinent details shall have been made by the Secretary of Defense to the Committees on the Armed Services of the Congress." The Secretary was also prohibited from assigning or detailing military personnel in such a way "as to impair . . . combatant functions" and from directing expeditures to effect results prohibited to him.

The Military Departments retained their status as "separately administered by their respective Secretaries" but "under the direction, authority and control of the Secretary of Defense." A provision was also added that "[n]o provision of this Act shall be so construed as to prevent a Secretary of a military department or a member of the Joint Chiefs of Staff from presenting to the Congress, on his own initiative, after first so informing the Secretary of Defense, any recommendation relating to the Department of Defense that he may deem proper."

3. The 1953 Reorganization Plan No. 6

In a letter of November 18, 1952 to the President, outgoing Secretary of Defense Robert A. Lovett detailed the strengths and weaknesses of the organization of the Department of Defense. On February 11, 1953, the incoming Secretary, Charles E. Wilson, appointed a blue ribbon committee to study Department of Defense organization.[20] On April 11, 1953 this Blue Ribbon Committee on Defense Organization, chaired by

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[20] See *id.* at 115-26.

Nelson A. Rockefeller and including the President's brother Milton Eisenhower, transmitted its report to Secretary of Defense Wilson. After careful review, the Committee recommended changes:

> in order to attain four compelling objectives:
> (1) The lines of authority and responsibility within the Department must be made clear and unmistakable.
> (2) The Secretary of Defense must be able to clarify the roles and missions of the services.
> (3) Planning must be based on the most effective use of our modern scientific and industrial resources.
> (4) The organization of the Department must be able to effect maximum economies without injuring military strength and its necessary productive support.[21]

Pursuant to these objectives the Committee concluded and recommended among other points:

- the Committee accepted a legal opinion from the Office of the Secretary of Defense that the Secretary of Defense had clear legal authority over the Military Departments despite the language retained in the 1949 amendments that the Departments be "separately administered";
- the Committee stressed that the Service Secretaries carry "full responsibility" for the administration of their Departments and that "the military chief of each service should be completely subject to the direction of civilian authority";
- the Secretary of Defense and the Joint Chiefs should have a close relationship;
- the Joint Chiefs should delegate more of their service functions to their service deputies and within the Joint Chiefs of Staff they should delegate more to subordinate committees;
- the Chairman of the Joint Chiefs should have an enhanced role in organizing the Joint Staff and the subordinate structure of the Joint Chiefs;
- the Joint Strategic Survey should be strengthened for strategic planning;
- the Secretary of Defense should assign executive responsibility for each unified command to a military department;

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[21] *Report of the Rockefeller Committee on Department of Defense Organization*, April 11, 1953, reprinted in U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON ARMED SERVICES , NATIONAL SECURITY ACT OF 1947 at 36, 36-37 (October 1973).

- certain statutory boards within the Department of Defense should be abolished with the functions assigned to the Secretary of Defense;
- six additional positions of Assistant Secretary of Defense should be created;
- a new position of General Counsel for the Department of Defense should be created with rank equivalent to that of an Assistant Secretary; and
- certain personnel practices for securing highly qualified military officers for service in the Office of the Secretary of Defense should be strengthened.

On April 30, 1953 President Eisenhower submitted Reorganization Plan No. 6 to Congress pursuant to the requirements of the Reorganization Act of 1949. The Plan became law on June 30, 1953 when neither House of Congress voted by simple majority to reject the plan within 60 days.[22] The Reorganization Plan, which almost immediately implemented some of the Rockefeller Committee recommendations, made the following changes:

- it abolished the Munitions Board, the Research and Development Board, and the Defense Supply Management Agency, and transferred all their functions to the Secretary of Defense;
- the selection of the Director of the Joint Chiefs of Staff by the Joint Chiefs of Staff, and his tenure, were made "subject to the approval of the Chairman of the Joint Chiefs of Staff";
- "[t]he functions of the Joint Chiefs of Staff with respect to managing the Joint Staff and the Director thereof" were "transferred to the Chairman of the Joint Chiefs of Staff;" and
- it created a position of General Counsel of the Department of Defense and added six additional Assistant Secretaries of Defense.

President Eisenhower, pursuant to the recommendations of the Rockefeller Commission, also shifted the operational command to run from the Secretary of Defense through the relevant Service Secretary and Chief whose service was the executive agency for a particular operational command. The President's message of April 30, 1943 transmitting Reorganization Plan No. 6 to the Congress indicated that the Key West Agreement would be modified to alter the designated agent system with respect to operational command. Pursuant to that intention, on March 17, 1954, the Secretary of Defense, "by direction of the President," signed a new "Functions Paper" (DoD Directive 5100.1) that, among other changes, altered the designated agent system to permit the Secretary of Defense, after consultation with the Joint Chiefs, to designate one of the Military Departments to serve as the executive agency for each unified command. The Service Secretaries and Chiefs were thereby placed in the operational chain. According to the Historical Office of the Office of the Secretary of Defense, this promulgation of a new "Functions Paper" clearly affirmed "the directive authority of the Secretary of Defense to establish and alter the functions of the armed forces and the Joint Chiefs . . . ."[23]

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[22] As will be discussed in section VI of this memorandum, the one house veto provision of the Reorganization Act of 1949 is almost certainly unconstitutional in light of the decision of the Supreme Court in the case of *I.N.S. v. Chadha*, 103 S.Ct. 2764 (1983). It seems highly unlikely that Chadha would be given retroactive effect so as to affect such a reorganization. If it were, the court would almost certainly conclude that only that part of the Act providing for a one house veto was unconstitutional, and thus the decision would not vitiate a reorganization pursuant to the Act. This would seem particularly the case in an area of substantial Executive Branch independent authority under the Commander-in-Chief and Executive powers of the President, as well as in an area where broad delegation from Congress has traditionally been upheld.

Subsequent to 1953 there have been a number of important inter-service differences on roles and missions. For example, there were significant differences in 1956 concerning development and operation of guided missiles and in 1957 concerning responsibilities for tactical air support for the Army.[24] Resolution of these differences, as well as subsequent alterations in service roles and the roles of the Joint Chiefs adopted by legislative amendment, have since March 16, 1954, largely been incorporated in periodically updated versions of Department of Defense Directive 5100.1, the current version of which was promulgated on May 1, 1985.

One important change in language in the 1954 "Functions Paper" (DoD Directive 5100.1 as of March 17, 1954) to reflect the altered duties in the operational chain of command was to change the description of the functions of the Joint Chiefs from "to include the general direction of all combat operations" to the weaker "including guidance for the operational control of forces and for the conduct of combat operations." This function of "direction of combat operations" for the operational command was restored to the Joint Chiefs in Department of Defense Directive 5100.1, promulgated after the important 1958 amendments and reflecting the 1958 shift in the operational chain of command back from the Military Departments to the Joint Chiefs.[25]

Reorganization plan No. 3, which entered into force on June 12, 1953, created an Office of Defense Mobilization in the Executive Office of the President and transferred to the new Office the functions of the Chairman of the National Security Resources Board created by the National Security Act of 1947, the Director and Office of Defense Mobilization, certain functions vested in the Munitions Board, and all functions under the Strategic and Critical Materials Stock Piling Act previously vested in the Secretaries of the Army, Navy, Air Force, and Interior, excluding certain functions vested in the Secretary of the Interior.

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[23] HISTORICAL OFFICE, *supra* note 15, at 293.

[24] See *id.* at 306-31.

[25] Compare the 1948 Functions Paper, the March 16, 1954 Functions Paper, the 1958 Department of Defense Directive 5100.1 and the May 1, 1985 Department of Defense Directive 5100.1. See HISTORICAL OFFICE, *supra*, note 15, at 305, 318.

4. The Department of Defense Reorganization Act of 1958.

On June 20, 1955, the Second Hoover Commission on Organization of the Executive Branch of the Government transmitted recommendations to the Congress concerning defense business organization and management. Shortly after the Soviet Union orbited its second satellite, Sputnik II, on November 3, 1957, President Dwight Eisenhower warned the American public of the importance of science and engineering for the defense of the Nation and indicated "that any new missile or related program . . . will, whenever practicable, be put under a single manager without regard to the separate services."[26] This message led ultimately to establishment of the Advanced Research Projects Agency within the Office of the Secretary of Defense by Department of Defense Directive 5105.15 of February 7, 1958.

On April 3, 1958 President Eisenhower sent a special message to Congress on Reorganization of the Defense Establishment. That message is among the most important in the history of defense organization and directly led to passage of the Department of Defense Reorganization Act of 1958. These 1958 Amendments are clearly the most sweeping and important changes to date in the legal structure established by the National Security Act of 1947.

In his April 3 message to the Congress, Eisenhower provided a detailed overview of recommended changes and stressed two principles as fundamental:

> First, separate ground, sea and air warfare is gone forever. If ever again we should be involved in war, we will fight it in all elements, with all services, as one single concentrated effort. Peacetime preparatory and organizational activity must conform to this fact. Strategic and tactical planning must be completely unified, combat forces organized into unified commands, each equipped with the most efficient weapons systems that science can develop, singly led and prepared to fight as one, regardless of service. The accomplishment of this result is the basic function of the Secretary of Defense, advised and assisted by the Joint Chiefs of Staff and operating under the supervision of the Commander-in-Chief.
>
> Additionally, Secretary of Defense authority, especially in respect to the development of new weapons, must be clear and direct, and flexible in the management of funds. Prompt decisions and elimination of wasteful activity must be primary goals.[27]

On April 16, 1958 the President followed his detailed letter with a more detailed proposed Department of Defense Reorganization Bill together with a sectional analysis.[28]

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[26] HISTORICAL OFFICE, *supra* note 15, at 171. See generally on the period from 1953-1958, *id.* at 163-75.

[27] Dwight D. Eisenhower, *Special Message to the Congress on Reorganization of the Defense Establishment*, April 3, 1958, reprinted in 65 PUBLIC PAPERS OF THE PRESIDENT at 271.

[28] *Defense Reorganization Bill*, PRESIDENT'S MESSAGES at 5444.

By August 6, 1958 Congress had given the President, in the newly enacted Department of Defense Reorganization Act of 1958,[29] most of what he had requested, with a major exception related to added flexibility in Defense Department appropriations on which the President retreated.

The principal changes of the 1958 Reorganization Act were as follows:

The 1958 Act continued the consolidation of the authority of the Secretary of Defense over the entire Department and particularly over the Service Secretaries. Despite acceptance by the 1953 Rockefeller Committee of the legal opinion that the Secretary had full authority over the Service Secretaries, the Act changed the controversial language "separately administered" to "separately organized" and made it absolutely clear through additional language changes that the Secretary of Defense was in full charge of the Department and the component Military Departments. Simultaneously, however, to avoid confusion as to the delegated authority of Assistant Secretaries of Defense in relation to the Service Secretaries, the Act provided that the Assistant Secretaries would have authority over the Military Departments only when the Secretary specified such delegation in writing with respect to a specific subject area and such authority was exercised through the Service Secretaries of the Departments.

The Act reduced the number of authorized Assistant Secretaries of Defense from nine to seven and reduced the number of Assistant Secretaries in each of the Military Departments from four to three. The Act also created a Director of Defense Research and Engineering. This was an upgrading of the position of Assistant Secretary for Research and Engineering following the merger into that position of the two Assistant Secretary positions of Assistant Secretary of Defense for Research and Development and Assistant Secretary of Defense for Applications Engineering.

Most importantly, the Act strengthened the unified and specified commands. It provided a more detailed statutory mandate for such commands and changed the responsibility for establishing unified commands from that of the Joint Chiefs "subject to the authority and direction of the President and the Secretary of Defense" to that of the President, through the Secretary of Defense "[w]ith the advise and assistance of the Joint Chiefs of Staff." Also, the language "combatant" was added to unified or specified commands, resulting in the new phrase "unified or specified combatant commands." In the words of the Senate Report:

> The military departments still would furnish the force that would make up unified commands and the military departments would control operations in other than unified and specified commands. The bill uses the word "combatant" to modify the unified or specified commands authorized to be established. This usage is intended to prevent the training, logistical,

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[29] For general discussion of the 1958 Act see Burke, *The Reorganization Act of 1958*, 1958 JAG JOURNAL 3 (Oct. 1958); Hibler, *A New Wineskin: An Analysis of the Reorganization Act of 1958*, 1958-59 JAG JOURNAL 3 (December 1958 - January 1959); Kintner, *Progress in Defense Organization*, 9 J. PUB. L. 73 (1960); Olverson, *Problems of Defense Unification Under the National Security Act*, 19 FED. BAR J. 3 (1958).

> and administrative functions of the military services from being organized into unified commands.[30]

The Act also added the important language that:

> combatant commands are responsible to the President and the Secretary of Defense for such military missions as may be assigned to them by the Secretary of Defense, with the approval of the President. Forces assigned to such unified combatant commands or specified combatant commands shall be under the full operational command of the commander of the unified combatant command or the commander of the specified combatant command. All forces not so assigned remain for all purposes in their respective departments. Under the direction, authority, and control of the Secretary of Defense each military department shall be responsible for the administration of the forces assigned from its department to such combatant commands. The responsibility for the support of forces assigned to combatant commands shall be vested in one or more of the military departments as may be directed by the Secretary of Defense . . .[31]

Consistent with this language of "full operational command," and the new chain of operational command removing the Military Departments from the chain, the authority of the Service Chiefs was amended to consistently provide authority to "exercise supervision" among the Service statutory frameworks[32] and to provide that "[s]uch supervision shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders . . . ." Although the Eisenhower message to the Congress of April 3 used the language "full unity of our commands" and "full command" with respect to "combatant functions," the Administration draft bill submitted to the Congress on April 16 had no language of "full command" or "full operational command." Thus, the language "full operational command" was an initiative of the Congress, though rooted in the Eisenhower letter.

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[30] Department of Defense Reorganization Act of 1958, Senate Report No. 1845, July 17, 1958 reprinted in LEGISLATIVE HISTORY DEFENSE REORGANIZATION ACT 3272, at 3275. On the general legislative history of the Department of Defense Reorganization Act of 1958 see, e.g., Department of Defense Reorganization Act of 1958, *Hearings before the Committee on Armed Services United States Senate*, 85th Congress, 2d Session on H.R. 12541 of June and July 1958; REORGANIZATION OF THE DEPARTMENT OF DEFENSE, HEARINGS BEFORE THE COMMITTEE ON ARMED SERVICES, House of Representatives, 85th Congress, 2d Session, pursuant to H.R. 11001, H.R. 11002, H.R. 11003, H.R. 11958, and H.R. 12541 of April and May 1958; DEPARTMENT OF DEFENSE REORGANIZATION ACT OF 1958, REPORT OF THE HOUSE ARMED SERVICES COMMITTEE, Report No. 1765, 85th Congress, 2d Session (May 22, 1958).

[31] Section 1 of the 1958 Act.

[32] It should be recalled that since the 1903 Act the statutory charter for the Army Chief of Staff used language of "supervision" rather than "command". The context for the 1903 change was a desire to clarify the authority of the Service Secretary over the Chief of Staff.

The 1958 Act also made a number of important changes with respect to the Joint Chiefs, the Chairman of the Joint Chiefs, and the Joint Staff. Most importantly, a major motivation for strengthening the Organization of the Joint Chiefs was the shift of the operational chain of command by removing the Military Departments and the associated expectation that the Joint Chiefs would be closely involved in providing advice to the Secretary of Defense in his more direct exercise of operational command authority. Thus, President Eisenhower's April 3 message to the Congress said:

> in keeping with the shift I have directed in operational channels, the Joint Chiefs of Staff will in the future serve as staff assisting the Secretary of Defense in his exercise of direction over unified commands. Orders issued to the commands by the Joint Chiefs of Staff will be under the authority and in the name of the Secretary of Defense. . . .
>
> With the operational channel now running from the Commander-in-Chief and Secretary of Defense directly to unified commanders rather than through the military departments, the Joint Chiefs of Staff must be further unified and strengthened in order to provide the operational and planning assistance heretofore largely furnished by staffs of the military departments.[33]

Similarly, the Senate Report said:

> The Joint Chiefs of Staff will furnish the advice and guidance upon which the orders of the Secretary of Defense are transmitted to the unified commanders . . . .The Joint Chiefs of Staff are not now charged with operational responsibility. Under the new arrangements, however, they will provide strategic direction of unified commands and therefore, for the first time, will require staff assistance in the nature of an operational unit . . .[34]; and
>
> Under the new system of directing unified commands, the Joint Chiefs of Staff will assist the Secretary of Defense in his exercise of direction over unified commands.[35]

Pursuant to this important new duty for the Joint Chiefs a number of changes were made in the OJCS. These included:

- the Service Chiefs were authorized and encouraged to delegate service functions to their Deputy Service Chiefs;

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[33] Dwight D. Eisenhower, *supra* note 27, at 281-82

[34] *Senate Report No. 1845*, *supra* nore 30, at 3276.

[35] *Id.* at 3279.

- The Joint Staff was increased from an authorized ceiling of 210 to 400 officers;
- The prohibition on voting by the Chairman of the Joint Chiefs was removed in a context in which Congress understood that the Joint Chiefs did not in any event vote and thus this provision was a needless detraction from the role of the Chairman and an unnecessary restriction;
- The Chairman of the Joint Chiefs was given the authority to select the Director of the Joint Staff "in consultation with the Joint Chiefs of Staff, and with the approval of the Secretary of Defense";
- The Chairman still managed the Joint Staff and the Director but his management was clarified to be "on behalf of the Joint Chiefs of Staff;"
- The Chairman was given the authority, along with the existing authority of the Joint Chiefs, to assign duties to the Joint Staff.

Finally, the 1958 Act made a number of minor changes such as restoring the annual report by the Secretary of Defense rather than the semi-annual report mandated in the 1949 Amendments. It also substantially altered the restrictions on the Secretary of Defense introduced in the 1949 amendments with respect to combatant transfer. An entirely new section 202(c) of the National Security Act of 1947, as amended in 1949, established an elaborate notice and single house veto on Secretary of Defense reorganization of functions which have "been established by law."[36] There were exceptions to this Congressional one-house veto approval system permitting Presidential or Secretary of Defense reorganization "if the President determines it is necessary because of hostilities or imminent threat of hostilities," the development and operational use of new weapons systems and "any supply or service activity." Congress explicitly affirmed and retained the power of the Service Chiefs and members of the Joint Chiefs to present recommendations directly to the Congress after first informing the Secretary of Defense.

Subsequent to passage of the 1958 amendments, the Secretary of Defense issued several directives clarifying the functions of the Department of Defense, including the role of the Joint Chiefs in the operational chain of command and the relations between the Organization of the Joint Chiefs of Staff and the Office of the Secretary of Defense, and the concept of operations of the world-wide Military Command and Control System. Directive 5100.1 issued on December 31, 1958, and its periodic revisions, have incorporated the modern equivalent of the "Functions Paper" as modified to reflect the current legal structure of defense organization.[37] Particularly important current DoD Directives are Nos. 5100.1 and 5158.1, both of May 1, 1985, and 5100.30 of December 2, 1971. With respect to the operational chain of command, current Directive 5100.1 provides:

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[36] This single house veto is also virtually certain to be unconstitutional under the *Chadha* decision. The interesting question is the effect of such an unconstitutional provision on the entire statute.

[37] See for some of the changes in DOD Directive 5100.1, HISTORICAL OFFICE, *supra* note 15, at 326-29.

> The chain of command [of the unified and specified commands] runs from the President to the Secretary of Defense and through the Joint Chiefs of Staff to the commanders of Unified and Specified Commands. Orders to such commanders shall be issued by the President or the Secretary of Defense, or by the Joint Chiefs of Staff by the authority and direction of the Secretary of Defense . . . .

And this same directive assigns as one function of the Joint Chiefs of Staff to:

> Prepare strategic plans and provide for the strategic direction of the armed forces, including the direction of operations conducted by commanders of Unified and Specified Commands and the discharge of any other function of command for such commands directed by the Secretary of Defense.

Department of Defense Directive 5100.30 provides in time-sensitive operations that:

> The channel of communication for execution of the Single Integrated Operational Plan (SIOP) and other time-sensitive operations shall be from the NCA [National Command Authority] through the Chairman of the Joint Chiefs of Staff, representing the Joint Chiefs of Staff, to the executing commanders.

Joint Chiefs of Staff Publication No. 2, "Unified Action Armed Forces (UNAAF)" of October 1974 continues to embody procedures and service divisions of responsibility concerning unified action.

5. Department of Defense Reorganization Act, 1985

During 1982 and 1983 hearings were held in the Investigations Subcommittee of the House Armed Services Committee concerning reorganization proposals for the Joint Chiefs of Staff.[38] These hearings were prompted in part by criticism of "the structure of the Joint Chiefs of Staff" by then Chairman General David C. Jones subsequently joined by Army Chief of Staff General Edward C. Meyer. The hearings and discussions led to an Administration bill conveyed to the Congress on April 18, 1983.

As described in a letter of May 19, 1983, from Secretary of Defense Casper Weinberger to Congressman Bill Nichols, the Administration bill would have dealt with two principal issues. First, it would have formally inserted the Chairman of the Joint Chiefs of Staff in the operational chain of command and removed the statutory prohibition on the Chairman in exercising military command. And second it would have made a number of changes to strengthen the Joint Staff. These were:

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[38] See, e.g, Reorganization Proposals for the Joint Chiefs of Staff, *Hearings Before the Investigations Subcommittee of the Committee on the Armed Services House of Representatives*, 98th Congress, 1st Sess. (June 14, 23, 29, 1983).

- To eliminate the legal limit of 400 officers on the Joint Staff;
- To extend the standard tour of duty on the Joint Staff from three to four years;
- to provide flexibility for the Secretary of Defense to continue individual officers on the Joint Staff beyond their statutory tour of duty;
- to allow reassignment of a former Joint Staff officer after two years in another assignment; and
- to eliminate the restriction against the continuation or recall to duty of the Director of the Joint Staff.[39]

A House Bill would have strengthened the role of the Chairman of the Joint Chiefs even more than the Administration proposal and would have made certain other changes, including changes intended to strengthen representation of the operational commands and enhance professionalism of the Joint Staff.[40] The House and Senate were able to agree on only some of these provisions for change in the Organization of the Joint Chiefs and these agreed provisions were incorporated in the Department of Defense Authorization Act, 1985 which took effect in 1984. In most important part they included the following changes:

- a provision was added to the statutory mandate of the Chairman of the Joint Chiefs providing "[s]ubject to the authority, direction, and control of the Secretary, the Chairman acts as the spokesman for the commanders of the combatant commands on operational requirements.";
- the standard term for members of the Joint Staff was increased from three to four years and the Secretary of Defense was given discretion to assign or detail an officer to duty with the Joint Staff within two years after relief of that officer from that duty; and
- the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, was charged with ensuring that Service personnel policies give appropriate consideration to service on the Joint Staff.

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[39] *Id.* at 3-9.

[40] *Legislative History DOD Authorization Act, 1985*, at 4308-13.

6. Miscellaneous Interim Changes

These four sets of changes in the National Security Act of 1947, in 1949, 1953, 1958 and 1984, were the most important changes in defense organization from 1947 to the present. As might be expected for such a large and complex subject as defense organization, however, there were a number of lesser changes.[41] The most important of these included:

- the National Security Act Amendments of 1956 established the Commandant of the Marine Corps as a full member of the Joint Chiefs when Corps matters were under discussion;
- In 1978 the Commandant of the Marine Corps became a full member of the Joint Chiefs;
- In June 1967 Congress provided a statutory four year term for the Service Chiefs, including the Commandant of the Marine Corps, and provided that in time of war or national emergency they may be reappointed for a second term not to exceed four years[42]; and
- A number of Defense Agencies were created to consolidate previously fragmented service functions. These include the Defense Communications Agency, the Defense Intelligence Agency, the National Security Agency and the Central Security Service, the Defense Logistics Agency, the Defense Contract Audit Agency, the Defense Mapping Agency, the Defense Advanced Research Projects Agency, the Defense Audiovisual Agency, the Defense Investigative Service, the Defense Legal Services Agency, the Defense Security Assistance Agency, the Uniformed Services University of the Health Sciences, the Office of the Defense Inspector General (established by law in fiscal year 1983); and most recently the Strategic Defense Military Organization established in fiscal year 1984. In addition to these fifteen Defense Agencies, eight Department of Defense Field Activities were established between 1974 and 1985 to perform selected support and service functions of a more limited scope.[43]

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[41] For a discussion of some of these lesser changes from 1959-1978, including particularly changes concerning civil defense and emergency preparedness see HISTORICAL OFFICE, *supra* note 15, at 262-64. For minor changes between 1953 and 1958 see *id.*, at 163-64.

[42] This limitation on the Commander-in-Chief in time of war or national emergency raises both constitutional and pragmatic questions. Even if Congress does have the constitutional authority (see discussion in sections V and VI, *infra*), is it *wise* to possibly deprive the Commander-in-Chief of his senior military advisers during wartime?

[43] See US. Senate, Committee on Armed Services, *Defense Organization: The Need for Change, Staff Report* 65-76 (16 Oct. 1985). These eight Field Activites are: The American Forces Information Services, the Department of Defense Dependents Schools, the Office of the Civilian Health and Medical Program of the Uniformed Services, the Office of Economic Adjustment, the Defense Medical Systems Support Center, Washington Headquarters Services, the Defense Technology Security Administration, and the Defense Information Services Activity. See *id* at 73-75.

C. Contemporary Discussion

As of January 1986 there is intense and continuing interest in the subject of defense organization. In June of 1983 and again in January of 1985 the Staff of the Senate Committee on Armed Services were requested by the Chairman and Ranking Minority Member of the Senate Armed Services Committee "to prepare a comprehensive study of the organization and decision-making procedures of the Department of Defense." Pursuant to that request a thorough and informative staff study, sometimes referred to as the *Locher Report* after its Study Director James R. Locher III, was completed and forwarded to the Chairman and Ranking Minority Member of the Senate Armed Services Committee on October 16, 1985. Similarly, evidencing the continuing high level of interest in the subject, a number of books and studies have recently been completed, including: Archie D. Barrett, *Reappraising Defense Organization* (published by the National Defense University Press in June of 1983); *Toward a More Effective Defense*, the Final Report of the Defense Organization Project of the Center for Strategic and International Studies, Georgetown University (published in February 1985); "Reorganization of the National Security Organization," a Report of the Chief of Naval Operations Select Panel (completed in March of 1985); Robert J. Art et al., *Reorganizing America's Defense; Leadership in War and Peace* (a collection of articles discussing U.S. defense organization, and discussing organizational structures in other countries, published by Pergamon-Brassey's in 1985); and an ongoing study by John H. Cushman, under the auspices of the Harvard University Center for Information Policy Research, entitled *Command and Control of Theater Forces: The Korea Command and Other Cases*. As indicated by the Introduction to this memorandum, the President's Blue Ribbon Commission on Defense Management is currently studying the issues with the expectation of a final report in June 1986.

C. Contemporary Discussions

[illegible]

> [illegible]

[illegible]

IV

THE PRESENT LEGAL STRUCTURE OF DEFENSE ORGANIZATION

A. General Overview

This part of Section IV will set out an overview of the present legal structure of defense organization. Part B of this Section will set out the specific legal status of each component of defense organization, including its constitutional, statutory, and regulatory basis, if any, from the President to the Armed Forces Policy Council. Part C of this Section will provide a legal analysis of selected issues that seem of particular interest in the contemporary discussion.

The legal structure of defense organization is largely shaped by the constitutional powers of the President as Chief Executive and Commander-in-Chief, the statutory framework set out in the National Security Act of 1947, as amended in 1949, 1953, 1958 and 1984, and periodic directives promulgated by the Secretary of Defense, particularly Directive 5100.1 (which incorporates the "Functions Paper" of 1948 as periodically amended), and Directives 5158.1 and 5100.30, as well as more specific agreements of the Joint Chiefs of Staff, as embodied, for example, in JCS Publication 2 "Unified Action Joint Forces."

As Chief Executive and Commander-in-Chief the President has substantial independent constitutional power concerning defense organization. That power may be delegated to subordinates such as the Secretary of Defense. It is taken as a given by all writers that the power of supreme command constitutionally belongs to the President and may be exercised by the President through his principal adviser the Secretary of Defense. Only the President or his constitutional successor in function or someone delegated authority by the President may authorize the use of the armed forces. The recurrent nineteenth century legal and political struggle to establish this point, as well as control by the principal civilian secretary, has been firmly and clearly won in the current legal structure. Indeed, these points may have been so clearly won that arguably the phrase "command" is too cautiously approached in describing the role of top military advisers in the chain of command.[1] The real issues are less the terminology of "command" than making absolutely clear that military commanders are subordinate to the authority of civilian leaders, encouraging the full utilization of military expertise consistent with such civilian authority, deciding what degree of autonomy should be exercised by field commanders as opposed to headquarters direction, and deciding what issues should be incident to operational combatant command as opposed to administrative support supervision (or command).

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[1] For a critique of the Navy and Air Force loss of language of "command" in the 1958 Amendments, see J. Grant, *The Reorganization Act of 1958*, 1959 JAG J. 3 (May 1959).

The National Security Act of 1947, as amended, seeks to provide for the unified direction of the Army, Navy (including the Marine Corps), and Air Force, each separately organized under its own Secretary but subject to the direction, authority, and control of the Secretary of Defense. While not merging these Military Departments it seeks to provide for the establishment of unified combatant commands, a clear and direct line of command to such commands, the unified strategic direction of the combatant forces, and their integration into an efficient team of land, naval, and air forces. This structure, and the history of defense organization, reflects a compromise between the need for efficient unified combatant commands for modern multi-theater multi-medium warfare and the efficiencies which experience has shown result from specialization of function in separate services.

The Secretary of Defense has clear authority over all elements of the military establishment subject only to Presidential control and Congressionally imposed constraints. From the President and the Secretary there are two command chains. Administrative support matters, including administrative support of component forces within unified combatant commands, are supervised through the Secretary and Chief of Staff of each Military Department. Operational command, however, is from the President and the Secretary of Defense as the National Command Authority, through the Joint Chiefs of Staff (and for time sensitive matters through the Chairman of the Joint Chiefs), directly to the commanders of the unified and specified forces. It is understood in this operational chain that the Joint Chiefs exercise an important strategic direction as the principal military advisors to the President, the NSC and the Secretary of Defense and as the channel for transmitting National Command Authority orders to the operational commanders. This Joint Chiefs role in strategic command, only activated pursuant to the direction of civilian National Command Authorities, and always subject to the authority of these civilian authorities, seems clearly contemplated by the statutory structure, particularly the 1958 amendments, as well as DOD Directives.

The principal ongoing ambiguity in the operational chain of command seems to be the precise differentiation of operational and administrative functions between the component commanders and the Military Departments. The statutory framework on this recurrent issue embodies what some post-legal realist legal philosophers have described as "complementarity." On the one hand it uses language of "full operational command" and on the other it limits this by reference to "combatant" and statutory provisions, as well as legislative history, that spell out continuing roles for the separate services in training, supply and general administrative matters. This ambiguity (and perhaps inevitable tension) has necessitated agreements such as the 1948 Key West and Newport agreements as currently updated and embodied in DOD Directives 5100.1 of May 1, 1985, and JCS Publication 2, that seek to draw basic lines between service roles and between service and Joint Chiefs roles, as well as between operational and administrative functions. There is, of course, likely to be considerable pragmatic wisdom embodied in a process of inter-service agreement on service roles as well as operational versus administrative roles as promulgated on Presidential authority by successive secretaries of Defense. There is a legitimate question, however, whether operational commanders have had adequate voice with the Military Departments in setting such agreements. One way to deal with this possibility if it were felt that operational commanders might not have had adequate voice in setting the parameters of operational versus administrative matters would be to seek to identify with some precision what functions, if any, currently considered administrative are necessary to effective combatant command and to intervene to clarify the balance solely with respect to such specifically identified functions. The test of needed change would presumably be one of costs and benefits for effective combatant command versus costs and benefits of efficiencies achieved in specialized Military Department administrative management, weighted by the importance of the incremental differences in effective combatant command and efficiencies in specialized management. One advantage of such a functional approach over a more general linguistic effort is that any trade-off can be more precisely defined. Moreover, a principal thrust of much of the twentieth century jurisprudence is that functional approaches to legal norms and legal change are generally more effective than vague all-encompassing and overly general verbal formulas. Indeed, arguably failure to specify operational versus administrative functions with greater precision, as opposed to general linguistic formulaes such as "full operational command," is a cause of any current deficiencies in the authority of operational commands. If persuasive functional changes cannot be found then perhaps the informal pragmatism of existing agreements should not be altered. A disadvantage of such a functional approach, however, may be that a problem is more general but its full functional dimensions will only be realized through time and circumstance, some perhaps making it too late for change. One alternative if a setting is perceived to be such, is to combine a precise functional approach with an appropriate enhancement in procedure for combat command representation or participation in decision-making.[2]

A diagram of the current legal structure of defense organization might look as depicted on the inside of the front cover. The principal point of potential legal ambiguity or uncertainty in this present system would seem to be a setting where service component commanders could theoretically receive conflicting orders from the operational and administrative chains or alternatively ignore command responsibilities because of uncertainty as to whether a specific function is administrative or combatant (operational). This may or may not be a real problem. Allocation of functions between combatant and administrative chains of command is currently set out in JCS Publication 2 on the basis of substantial pragmatic experience.

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[2] There seems at present a clear statutory role for the Service Secretaries and the Joint Staff of OJCS.

B. Specific Legal Status of Defense Organization Components

1. The President and the Congress (the constitutional framework).

Article two, Section one, of the Constitution provides that "[t]he executive power shall be vested in a President of the United States of America." Article two, Section two, provides that "[t]he President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . . ."

As will be discussed in Section V of this memorandum, these Presidential powers, and particularly the power as "commander-in chief" clearly establish the President as legally supreme over the defense establishment, subject only to an obligation not to violate the Constitution of the United States and to comply with constitutional enactments of Congress unless his actions fall within an area of exclusive Presidential power. The President is the supreme commander of all the military forces entrusted to him. Operational command of United States military forces is rooted in Presidential authority. The President may delegate that authority, as to his principal civilian military adviser the Secretary of Defense, or when there is no Secretary, to the Deputy Secretary of Defense. Because of this constitutional underpinning of command authority, the President, the Secretary of Defense, and acting in his absence, the Deputy Secretary of Defense, are known as the civilian National Command Authority from which orders to military forces originate.

The Constitution does not spell out how the President must delegate command authority. He may personally take charge in the field as President Washington did during the 1794 Whiskey Rebellion,[3] or he may delegate to civilian or military leaders.[4]

Ambiguities in nineteenth century defense organization gave rise to disputes between various army generals and Secretaries of War as to who exercised delegated Presidential command authority. That ambiguity was unequivocally resolved in favor of the civilian Secretaries as of the Act of February 14, 1903.[5] The current legal structure of defense organization is absolutely clear on this point--and the nineteenth century ambiguity strikes the modern analyst as astounding. One hangover from the nineteenth century struggle may be a recurrent use of the phrase "supervision" rather than "command" to describe high level military participation in the command chain.

As Section V of this memorandum will explore in more detail, the principal modern ambiguity concerning the President's authority over the military is the extent to which congressional powers do or do not permit statutory enactments inconsistent with Presidential order.[6] It is conceded on all sides, however, that the President may obtain military advice in any manner that he deems appropriate regardless of statutory defense organization. It would also seem virtually certain that the President has a broadly delegable power to order changes in defense organization subject only to the power of Congress acting through constitutional legislation and often imposing political realities.

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[3] See A. KING, THE COMMAND OF THE ARMY: A LEGAL AND HISTORICAL STUDY OF THE RELATIONSHIPS OF THE PRESIDENT, THE SECRETARIES OF WAR AND THE ARMY, THE GENERAL OF THE ARMY, AND THE CHIEF OF STAFF, WITH ONE ANOTHER 3 (1960).

[4] See *id.* at 2-4, and 7 Ops. Att'y Gen. 453, 479 (1855), as discussed by Colonel King.

[5] See generally *id.*.

[6] See, e.g., *Swaim v. United States*, 28 Ct. Cl. 173, *aff'd* 165 U.S. 553 (1893).

2. Overview Framework of the National Security Act (congressional declaration of purpose)

(a) statutory provision

The principal current congressional declaration of purpose for defense organization, derived from Section 2 of the National Security Act of 1947, as amended, is:

> In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces, for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.[7]

(b) general discussion

This congressional declaration of purpose is carefully balanced and reflects more than forty years of thought about appropriate defense organization. Major historic decisions not to merge the Military Departments, to clearly subordinate the Military

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[7] 50 U.S.C. § 401.

Departments to the authority of the Secretary of Defense, and to provide integrated operational commands are clearly evident. Nevertheless, as a high level generalization of purpose it reflects a complementarity between historic competing positions frequently found in such high level legal expressions of overall policy.

3. Participation in the National Security Council System

a. Constitutional and statutory basis

The President would seem to have broad constitutional power to organize his defense advisory system and to establish participation in such a system. The current National Security Council system, as established pursuant to the National Security Act of 1947, as amended, provides in 50 U.S.C. Section 402 with respect to general function and composition:

> There is established a council to be known as the National Security Council (hereinafter in this section referred to as the "Council").
> The President of the United States shall preside over meetings of the Council: Provided, that in his absence he may designate a member of the Council to preside in his place.
> The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.
> The Council shall be composed of -
> (1) the President;
> (2) the Vice President;
> (3) the Secretary of State;
> (4) the Secretary of Defense;
> (5) the Director for Mutual Security;
> (6) the Chairman of the National Security Resources Board; and
> (7) The Secretaries and Under Secretaries of other executive departments and of the military departments, the Chairman of the Munitions Board, and the Chairman of the Research and Development Board, when appointed by the Present by and with the advice and consent of the Senate, to serve at his pleasure.[8]

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[8] *Id.*. § 402.

(b) general discussion

Changes in the original composition of the Council since the 1947 Act include the addition of the Vice President and the downgrading of the Service Secretaries to serving on the Council at the appointment and pleasure of the President with the consent of the Senate. Moreover, the office of the Director for Mutual Security, the National Security Resources Board, together with the office of Chairman, the Munitions Board, together with the office of Chairman, the Research and Development Board, together with the office of the Chairman, has been abolished. By Executive Order 11905 of February 18, 1976, statutory members of the National Security Council are the President, Vice President, Secretary of State, and the Secretary of Defense. Reorganization Plan No. 4 of 1949 transferred the National Security Council, together with its functions, records, property, personnel and unexpended balances to the Executive Office of the President.

Although there is no mention of the Joint Chiefs of Staff in Section 402, by 10 U.S.C. Section 141, another provision of the National Security Act of 1947, as amended, the Joint Chiefs "are the principal military advisers to the President, the National Security Council, and the Secretary of Defense." The language that the Joint Chiefs of Staff serve as the principal military advisers to "the National Security Council" was added with the 1949 amendments. The 1947 Act had mentioned such an advisory role only to the President and Secretary of Defense.

By National Security Council practice, the Joint Chiefs of Staff are represented in most working groups and the Chairman of the Joint Chiefs would frequently attend important NSC meetings in his representational capacity for the Joint Chiefs. And as the principal military advisers to the President, the Joint Chiefs may meet directly with the President as well as the Secretary of Defense. Admiral Thomas H. Moorer, as a former Chairman of the Joint Chiefs of Staff, has made the point, however, that whatever the law provides, a President who does not want to listen to military advice can easily avoid such advice.[9]

Any question concerning more direct statutory language to make the Joint Chiefs of Staff formal listed members of the NSC would seem to relate not to legal authority for their participation in the NSC system, which is evident, but the question of enhanced Joint Chiefs status as an encouragement of professional military views in NSC deliberations and, perhaps indirectly, as an encouragement of more direct interchange of military views with the President. The principal sensitivity with respect to such a change would seem to be that of placing the Joint Chiefs, who within the Department of Defense are subject to the authority of the Secretary of Defense, on a Presidential Council with the Secretary. The Nichols Bill (H.R. 3718) would formally add the Chairman of the Joint Chiefs of Staff to the NSC. Depending on Congressional intent, this might also raise questions concerning the authority of the Chairman versus that of the Joint Chiefs. Currently the Chairman advises the NSC in a *representational* capacity on behalf of the Joint Chiefs.

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[9] *Structural Difficulties--Is a JCS Reorganization Really Needed: Interview with Admiral Thomas H. Moorer*, 28 SEA POWER 21, 26 (1985).

4. The Secretary of Defense

(a) constitutional and statutory mandate

The Secretary of Defense is the principal civilian advisor to the President with respect to defense matters. As such, the Secretary would seem to exercise the constitutional power of the President over national defense affairs when delegated to the Secretary--as is normally presumed in actions of the Secretary. In addition, the power of the Secretary of Defense are set out in 10 U.S.C. Section 133, derived from the National Security Act of 1947, as amended:

> **133. Secretary of Defense: appointment; powers and duties; delegation by**
>
> (a) There is a Secretary of Defense, who is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. A person may not be appointed as Secretary of Defense within 10 years after relief from active duty as a commissioned officer of a regular component of an armed force.
>
> (b) The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 USC 401), he has authority, direction, and control over the Department of Defense.
>
> (c) The Secretary shall report annually in writing to the President and the Congress on the expenditures, work, and accomplishments of the Department of Defense during the period covered by the report, together with--
>
> > (1) a report from each military department on the expenditures, work, and accomplishments of that department;
> >
> > (2) itemized statements showing the savings of public funds, and the eliminations of unnecessary duplications, made under section 125 of this title;
> >
> > (3) a report from the Reserve Forces Policy Board on the reserve programs of the Department of Defense, including a review of the title, as far as they apply to reserve officers; and
> >
> > (4) such recommendations as he considers appropriate.
>
> (d) Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of , such persons in, or organizations of, the Department of Defense as he may designate.
>
> (e) After consulting with the Secretary of State, the Secretary of Defense shall submit the Committees on Armed Services of the Senate and

House of Representatives before February 1 of each year a written report on--

(1) the foreign policy and military force structure for the next fiscal year;

(2) the relationship of that policy and structure to each other, and

(3) the justification for the policy and structure.[10]

The Secretary of Defense also has other statutory authority. For example, 10 U.S.C. § 141 begins a listing of duties of the Joint Chiefs of Staff by providing "[s]ubject to the authority and direction of the President and the Secretary of Defense . . . ."[11]

(b) general discussion

The history of defense organization and current law make clear that the Secretary of Defense is the highest civilian adviser to the President in defense matters and that he has authority over the entire Department of Defense including the Service Secretaries and the Joint Chiefs of Staff. Limitations on the Secretary are those imposed by the Constitution and Presidential direction, a few statutory restrictions raising in some cases potential constitutional issues as will be discussed in Parts V and VI of this memorandum, [12] and the pragmatic limitations of political realities and in most cases a lack of professional military expertise.

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[10] 10 U.S.C. § 133.

[11] For a partial listing of statutory powers of the Secretary of Defense, see *infra*, Section IV(c)6.

[12] A legal opinion prepared within the Office of the Secretary of Defense on March 27, 1953, discusses the broad authority of the Secretary of Defense and lists six limitations "on the supreme power of the Secretary of Defense" as: (1) an exercise of power so as to transfer "the combatant functions of the military services"; (2) indirect accomplishment of the above by "detailing or assigning personnel" or "directing the expenditure of funds;"(3) an exercise of power to merge the three military departments or deprive the Service Secretaries of their lawful authority to administer their departments subject to the authority of the Secretary; (4) an exercise of power "to establish a single commander of all the Armed Forces; an operating military supreme command over the Armed Forces; or a supreme Armed Forces general staff"; (5) an exercise to transfer certain other functions without first notifying the Armed Services Committees of the Congress; and (6) and exercise to constrain the statutory power of the Service Secretaries or members of the Joint Chiefs to present recommendations to Congress after first informing the Secretary of Defense. See *Legal Opinion Re The Power and Authority of the Secretary of Defense*, March 27, 1953, reprinted in COMMITTEE ON ARMED SERVICES U.S. HOUSE OF REPRESENTATIVES, NATIONAL SECURITY ACT OF 1947, AS AMENDED THROUGH SEPTEMBER 30, 1973 (Rpt. 93-21, Oct. 1973). Note also that this legal opinion was issued prior to the shift in the 1958 Amendments to the one-house veto provision in current law, rather than the total prohibition provision introduced in the 1949 Amendments. The recent Supreme Court decision in the *Chadha* case raises constitutional questions as to the validity of statutory restrictions on the Secretary of Defense utilizing a one- or two-house "congressional veto." This issue will be addressed *infra*, in Section VI.

(5) The Deputy Secretary of Defense

(a) constitutional and statutory mandate

The position of Deputy Secretary of Defense was created in the 1949 Amendments to the National Security Act of 1947. The Deputy Secretary would seem to have, as does the Secretary, substantial constitutional authority stemming from any Presidential delegation to the Secretary and in turn from the Secretary to the Deputy Secretary or directly from the President to the Deputy Secretary.

The statutory charter for the Deputy Secretary is set in 10 U.S.C. § 134 as:

> (a) There is a Deputy Secretary of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. A person may not be appointed as Deputy Secretary of Defense within ten years after relief from active duty as a commissioned officer of a regular component of an armed force.
>
> (b) The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Deputy Secretary shall act for, and exercise the powers of the Secretary when the Secretary is disabled or there is no Secretary of Defense.
>
> (c) The Deputy Secretary takes precedence in the Department of Defense immediately after the Secretary.[13]

(b) general decision

The original 1949 provision creating the Deputy Secretary and specifying when he acts for the Secretary used language of during the "disability or absence" of the Secretary. The current language "when the Secretary is disabled or there is no Secretary of Defense" was introduced in 1972 with amendments authorizing two Deputy Secretaries of Defense. That authority for two Deputy Secretaries was revoked and the present language authorizing only one Deputy Secretary was adopted in 1977.

When acting for the Secretary pursuant to this legislation, the Deputy Secretary would seem to have all the legal authority of the Secretary. It may be confusing and poor practice, but it seems highly probable that the President could choose to act directly through the Deputy Secretary--or anyone else--in just the "absence" rather than the "disability" of the Secretary; or even in the presence of the Secretary, despite the limiting language of 10 U.S.C. § 134. It might be useful to review whether the language of the current statute, excluding the "absence" of the Secretary is or is not appropriate. The operative effect of the current provision is, of course, broader than simply serving to transmit Presidential orders.

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[13] 10 U.S.C. § 134.

(6) The Department of Defense and the Office of the Secretary of Defense (OSD)

(a) Constitutional and statutory mandate

The "National Military Establishment" and subsequently the "Department of Defense" as an "Executive Department of the Government" were created respectively by the National Security Act of 1947, and the 1949 amendments to that Act. As previously discussed, the President and, by delegation, the Secretary of Defense, would seem to have substantial constitutional authority to organize the Department of Defense. In addition, there is a substantial statutory framework for the Department of Defense and the Office of the Secretary of Defense. As codified in Title 10 of the United States Code, this includes:

10 U.S.C. § 131. Executive department.

The Department of Defense is an executive department of the United States.

10 U.S.C. §135. Under Secretaries of Defense: appointment; powers and duties; precedence

(a) There are two Under Secretaries of Defense, one of whom shall be the Under Secretary of Defense for Policy and one of whom shall be the Under Secretary of Defense for Research and Engineering. The Under Secretaries of Defense shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. A person may not be appointed Under Secretary of Defense for Policy within ten years after relief from active duty as a commissioned officer of a regular component of an armed force.

(b) The Under Secretary of Defense for Policy shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Under Secretary of Defense for Research and Engineering shall perform such duties relating to research and engineering as the Secretary of Defense may prescribe, including-

(1) being the principal adviser to the Secretary on scientific and technical matters;

(2) supervising all research and engineering activities in the Department of Defense; and

(3) directing, controlling, assigning, and reassigning research and engineering activities that the Secretary considers need centralized management.

(c) The Under Secretary of Defense for Policy takes precedence in the Department of Defense after the Secretary of Defense, the Deputy Secretary of Defense, and the Secretaries of the military departments. The Under Secretary of Defense for Research and Engineering takes precedence in the Department of Defense immediately after the Under Secretary of Defense for Policy.

10. U.S.C. § 136. Assistant Secretaries of Defense: appointment; powers and duties; precedence

(a) There are eleven Assistant Secretaries of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate.

(b)

(1) The Assistant Secretaries shall perform such duties and exercise such powers as the Secretary of Defense may prescribe.

(2) One of the Assistant Secretaries shall be the Assistant Secretary of Defense for Health Affairs. He shall have as his principal duty the overall supervision of health affairs of the Department of Defense.

(3) One of the Assistant Secretaries shall be the Assistant Secretary of Defense for Manpower and Logistics. He shall have as his principal duty the overall supervision of manpower and logistics affairs of the Department of Defense.

(4) One of the Assistant Secretaries shall be the Assistant Secretary of Defense for Reserve Affairs. He shall have as his principal duty the overall supervision of reserve component affairs of the Department of Defense.

(5) One of the Assistant Secretaries shall be the Assistant Secretary of Defense for Command, Control, Communications and Intelligence. He shall have as his principal duty the overall supervision of command, control, communications and intelligence affairs of the Department of Defense.

(6) One of the Assistant Secretaries shall be the Comptroller of the Department of Defense and shall, subject to the authority, direction, and control of the Secretary--

(A) advise and assist the Secretary in performing such budgetary and fiscal functions and duties, and in exercising such budgetary and fiscal powers, as are needed to carry out the powers of the Secretary;

(B) supervise and direct the preparation of budget estimates of the Department of Defense;

(C) establish and supervise the execution of principles, policies, and procedures to be followed in connection with organizational and administrative matters relating to--

(i) the preparation and execution of budgets;

(ii) fiscal, cost, operating, and capital property accounting;

(iii) progress and statistical reporting; and

(iv) internal audit;

(D) establish and supervise the execution of policies and procedures relating to the expenditure and collection of funds administered by the Department of Defense; and

(E) establish uniform terminologies, classifications, and procedures concerning matters covered by clauses (A) through (D).

(c) Except as otherwise specifically provided by law, an Assistant Secretary may not issue an order to a military department unless--

(1) the Secretary of Defense has specifically delegated that authority to him in writing; and

(2) the order is issued through the Secretary of the military department concerned, or his designee.

(d) In carrying out subsection (c) and section 3010, 3012(b) (last two sentences), 5011 (first two sentences), 5031(a) (last two sentences), 8010, and 8012(b) (last two sentences) of this title, the Secretary of each military department, his civilian assistants, and members of the armed forces under the jurisdiction of his department shall cooperate fully with personnel of the Office of the Secretary of Defense to achieve efficient administration of the Department of Defense and to carry out effectively the authority, direction, and control of the Secretary of Defense.

(e) The Assistant Secretaries take precedence in the Department of Defense after the Secretary of Defense, the Deputy Secretary of Defense, the Secretaries of the military departments, and the Under Secretaries of Defense.[14]

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[14] See also 10 U.S.C. § 132. Seal; 10 U.S.C. 133(a). Secretary of Defense: annual report on North Atlantic Treaty Organization Readiness; 10 U.S.C. § 1336. Sale or transfer of defense articles: reports to Congress; 10 U.S.C. § 136a. Director of Operational Test and Evaluation: appointment; powers and duties; 10 U.S.C. § 137. General Council appointment; powers and duties. (The Office of General Counsel is an Assistant Secretary rank and was created by Section 4 of the 1953 Reorganization Plan No. 6); 10 U.S.C. § 138. Annual authorization of appropriation and personnel strengths for the armed forces; annual manpower requirements and operations and maintenance reports; 10 U.S.C. § 139. Secretary of Defense: weapons development and procurement schedules for armed forces; reports; supplemental reports; 10 U.S.C. § 139a. Oversight of cost growth in major programs: Selected Acquisition Reports; 10 U.S.C. § 139b. Oversight of cost growth of major programs: unit cost reports; 10 U.S.C. § 139c. Major defense acquisition program: independent cost estimates; 10 U.S.C. § 140. Emergencies and extraordinary expenses; 10 U.S.C. § 140a. Secretary of Defense: funds transfer for foreign cryptologic support; 10 U.S.C. §140b. Prohibition of certain civilian personnel management constraints; and 10 U.S.C. § 140c. Secretary of Defense: authority to withhold from public disclosure certain technical data. The functions of the Department of Defense are also spelled out in Department of Defense Directive 5100.1 of May 1, 1985, the current version of the 1948 "Functions Paper."

(b) general discussion

The Secretary of Defense would seem to have substantial constitutional authority, by delegation of authority from the President, to organize and make rules and regulations for the Department of Defense. His status as head of an Executive Department also carries such authority. This authority is exercised subject to any constitutionally binding statutory provisions.

The number and statutory composition of Under Secretaries and Assistant Secretaries has varied considerably. The current number and composition of the two Under Secretaries of Defense was established by amendment in 1977. The 1958 Amendments raised the number of Assistant Secretaries from three to seven. Subsequent amendments in 1962, 1967, 1969, 1971, 1979, and 1983 altered the composition or number of Assistant Secretaries to the current specified level of eleven (plus a General Counsel position established in 1953 with the rank of Assistant Secretary).

7 The Authority of the Secretary of Defense to transfer defense functions and to establish the Defense Agencies.

(a) constitutional and statutory basis

As previously discussed, the Secretary of Defense by delegation from the President and as head of an Executive Department would seem to have substantial authority to transfer defense functions and organize the Department of Defense subject to constitutionally valid and binding statutory provisions to the contrary.

One important statutory provision that serves as a possible source of authority as well as a possible constraint is 10 U.S.C. § 125, which provides.

> **125. Functions, powers, and duties: transfer, reassignment, consolidation, or abolition**
>
> (a) Subject to section 401 of title 50, the Secretary of Defense shall take appropriate action (including the transfer, reassignment, consolidation, or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense. However, except as provided by subsections (b) and (c), a function, power, or duty vested in the Department of Defense, or an officer, official, or agency thereof, by law may not be substantially transferred, reassigned, consolidated, or abolished unless the Secretary reports the details of the proposed transfer, reassignment, or abolition to the Committees on Armed Services of the Senate and House of Representatives. The transfer, reassignment, consolidation, or abolition concerned takes effect on the first day after the expiration of the first 30 days that Congress is in continuous session after the Secretary so reports unless either of those Committees, within that

period, reports a resolution recommending that the proposed transfer, reassignment, consolidation, or abolition be rejected by the Senate or the House of Representatives, as the case may be, because it--

(1) proposes to transfer, reassign, consolidate, or abolish a major combatant function, power, or duty assigned to the Army, Navy, Air Force, or Marine Corps by sections 3062(b), 5012, 5013, or 8062(c) of this title; and

(2) would, in its judgement, tend to impair the defense of the United States.

If either of those Committees, within that period, reports such a resolution and it is not adopted by the Senate or the House of Representatives, as the case may be, within the first 40 days that Congress is in continuous session after that resolution is so reported, the transfer, reassignment, consolidation, or abolition concerned takes effect on the first day after the expiration of that forty-day period. For the purposes of this subsection, a session may be considered as not continuous only if broken by an adjournment of Congress, sine die. However, in computing the period that Congress is in continuous session, days that the Senate or the House of Representatives is not in session because of an adjournment of more than three days to a day certain are not counted.

(b) Notwithstanding subsection (a), if the President determines it to be necessary because of hostilities or an imminent threat of hostilities, any function, power, or duty, including one assigned to the Army, Navy, Air Force, or Marine Corps by sections 3062(b), 5012, 5013, or 8062 (c) of this title, may be transferred, reassigned, or consolidated. The transfer, reassignment, or consolidation remains in effect until the President determines that hostilities have terminated or that there is no longer an imminent threat of hostilities, as the case may be.

(c) Notwithstanding subsection (a), the Secretary of Defense may assign or reassign the development and operational use of new weapons or weapons systems to one or more of the military departments or one or more of the armed forces. However, notwithstanding any other provision of this title or any other law, the Secretary of Defense shall not direct or approve a plan to initiate or effect a substantial reduction or elimination of a major weapons system until the Secretary of Defense has reported all the pertinent details of the proposed action to the Congress of the United States while the Congress is in session.

(d) In subsection (a) (1), "major combatant function, power, or duty" does not include a supply or service activity common to more than one military department. The Secretary of Defense shall, whenever he determines it will be more effective, economical, or efficient, provide for the performance of such an activity by one agency or such other organizations as he considers appropriate.

(b) general discussion

The 1949 Amendments to the National Security Act of 1947 introduced stringent prohibitions on the Secretary in transfer of combatant functions among the military departments. Apparently this was part of the *quid pro quo* extracted by Congress for strengthening the authority of the Secretary of Defense in those Amendments. These prohibitions were substantially softened in the 1958 Amendments and subsequent law by provision for notification of Congress in certain transfers coupled with a one-house "congressional veto." Subsequent amendments to this provision were made in 1962, and 1966 resulting in the present statutory language. The 1966 amendments introduced a Congressional notification provision for "substantial reduction or elimination of a major weapons system." Following the *Chadha* decison, the one-house veto of the provision is likely to be unconstitutional--raising an interesting question as to what parts of this current statutory provision concerning either authority or constraints on authority are still valid.

(8) The Joint Chiefs of Staff

(a) constitutional, statutory, and regulatory basis

The Joint Chiefs of Staff came into being in World War II pursuant to the authority of the President. There would seem to be substantial constitutional authority in the President to organize and regulate the Joint Chiefs (and all components of OJCS, including the Chairman of the Joint Chiefs and the Joint Staff). In the National Security Act of 1947 the Joint Chiefs of Staff were also provided with a statutory basis. The current statutory embodiment of this basis, 10 U.S.C. § 141 provides:

> **141. Composition; functions**
>
> (a) There are in the Department of Defense the Joint Chiefs of Staff consisting of--
>
> (1) a Chairman;
> (2) the Chief of Staff of the Army;
> (3) the Chief of Naval Operations;
> (4) the Chief of Staff of the Air Force; and
> (5) the Commandant of the Marine Corps.
>
> (b) The Joint Chiefs of Staff are the principal military advisers to the President, the National Security Council, and the Secretary of Defense.
>
> (c) Subject to the authority and direction of the President and the Secretary of Defense, the Joint Chiefs of Staff shall--
>
> (1) prepare strategic plans and provide for the strategic direction of the armed forces;
> (2) prepare joint logistic plans and assign logistic responsibilities to the armed forces in accordance with those plans;

(3) establish unified commands in strategic areas;
(4) review the major material and personnel requirements of the armed forces in accordance with strategic and logistic plans;
(5) formulate policies for the joint training of the armed forces;
(6) formulate policies for coordinating the military education of members of the armed forces;
(7) provide for representation of the United States on the Military Staff Committee of the United Nations in accordance with the Charter of the United Nations; and
(8) perform such other duties as the President or the Secretary of Defense may prescribe.

(d) After first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate.[15]

The functions of the Joint Chiefs of Staff and their relationship to the Office of the Secretary of Defense are also specified in greater detail in DOD Directives 5100.1 and 5158.1 of May 1, 1985. DOD Directive 5100.1 is the current version of the 1948 "Functions Paper" or "Key West Agreement," as modified.[16]

(b) general discussion

The Joint Chiefs of Staff are the principal military advisers to the President, the National Security Council, and the Secretary of Defense. Their enumerated duties are performed subject to the authority of the President and the Secretary of Defense. In general, they operate by agreement. Pursuant to 1956 amendments, the Commandant of the Marine Corps was given "co-equal status" with the Joint Chiefs for matters that "directly . . . [concern] the Marine Corps . . . ." The Commandant was made a full member of the Joint Chiefs in 1978.

(9) The Chairman of the Joint Chiefs of Staff

(a) statutory and regulatory basis

The position of Chairman of the Joint Chiefs of Staff was created by the 1949 Amendments to the National Security Act of 1947. Current statutory authorization, as codified in 10 U.S.C. § 142, provides:

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[15] For an early general discussion of the Joint Chiefs of Staff see J. Everhard, *The Joint Chiefs of Staff*, JAG L. REV. 8 (1964).

[16] See also, particularly with respect to the time-sensitive channel of communication, Department of Defense Directive 5100.30 of December 2, 1971.

142 Chairman

(a) The Chairman of the Joint Chiefs of Staff shall be appointed by the President, by and with the advice and consent of the Senate, from the officers of the regular components of the armed forces. He serves at the pleasure of the President for a term of two years, and may be reappointed in the same manner for one additional term. However, in time of war declared by Congress there is no limit on the number of reappointments.[17]

(b) In addition to his other duties as a member of the Joint Chiefs of Staff, the Chairman shall, subject to the authority and direction of the President and the Secretary of Defense--

(1) preside over the Joint Chiefs of Staff;

(2) provide agenda for the meetings of the Joint Chiefs of Staff (including any subject for the agenda recommended by the Joint Chiefs of Staff), assist them in carrying on their business as promptly as practicable, and determine when issues under consideration shall be decided; and

(3) inform the Secretary of Defense, and, when the President or the Secretary of Defense considers it appropriate, the President, of those issues upon which the Joint Chiefs of Staff have not agreed.

(c) While holding office, the Chairman outranks all other officers of the armed forces. However, he may not exercise military command over the Joint Chiefs of Staff or any of the armed forces.[18]

In addition, DOD Directive 5158.1 of May 1, 1985 clarifies this authority:

> The Chairman of the Joint Chiefs of Staff shall have the authority and responsibility to:
>
> a. Serve as a member of and preside over the Joint Chiefs of Staff.
>
> b. Provide agenda for meetings of the Joint Chiefs of Staff (including any subject for the agenda recommended by the Joint Chiefs of Staff), assist them in carrying on their business as promptly as practicable, and determine when issues under consideration shall be decided.
>
> c. Furnish the Secretary of Defense with periodic progress reports on important items of current interest that are being considered by the Joint Chiefs of Staff.

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[17] Note the contrast between this provision and that of two four-year terms for the Service Chiefs as well as the limitation of the statutory exception here to "time of war declared by Congress." This latter limitation could in some settings be unconstitutional and the discrepancy in statutory language between the Chairman of the Joint Chiefs and the Service Chiefs suggests that review might be useful.

[18] See also the statutory provision in 10 U.S.C. § 124 concerning the role of the Chairman as spokesman for the commanders of combatant commands on operational requirements.

d. Keep the Secretary of Defense informed on issues upon which agreement among the Joint Chiefs of Staff has not been reached, and forward to the Secretary of Defense the recommendations, advice, and views of the Joint Chiefs of Staff, including any divergencies.

e. Arrange for the provision of military advice to all offices of the Office of the Secretary of Defense.

f. Act as spokesman for the commanders of the combatant commands on operational requirements.

g. Make arrangements to relieve the Joint Chiefs of Staff of matters of lesser importance.

h. Organize the structure of the Organization of the Joint Chiefs of Staff to ensure that it is designed to accomplish efficiently the tasks to be assigned.

i. Manage the Organization of the Joint Chiefs of Staff and the Director of the Joint Staff on behalf of the Joint Chiefs of Staff by conducting, guiding, and administering the work of the elements affected, and ensuring that the work is performed in a manner that permits the Secretary of Defense and the Joint Chiefs of Staff to discharge their total responsibilities. The organization of the Joint Chiefs of Staff shall perform such duties as the Joint Chiefs of Staff or the Chairman of the Joint Chiefs of Staff prescribe.

j. Keep the Joint Chiefs of Staff informed, as appropriate, about any matter that is referred by the Chairman to the Secretary of Defense with a recommendation that the matter be assigned to a Military Department for consideration or action.

k. Appoint consultants to the Joint Chiefs of Staff from outside the Department of Defense, subject to the approval of the Secretary of Defense and with the advice of the Joint Chiefs of Staff.[19]

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[19] "Organization of the Joint Chiefs of Staff and Relationships with the Office of the Secretary of Defense," DOD Directive No. 5158.1 (May 1, 1985), at 2-3. See also DOD Directive 5100.30 of December 2, 1971, § III A, with respect to the role of the Chairman of the Joint Chiefs as the channel of communication for execution of the Single Integrated Operational Plan (SIOP) "and other time-sensitive operations" "representing the Joint Chiefs of Staff . . . ."

(b) general discussion

The role of the Chairman of the Joint Chiefs is to serve as a member of the Joint Chiefs and to carry out the specific duties assigned by statute and DOD Directive. When participating in meetings with the President or Secretary of Defense or NSC meetings, the Chairman, and members of the Joint Staff, normally represent the position of the Joint Chiefs, but if requested, the Chairman may also present his own views denominated as such. The prohibition that the Chairman may not exercise military command over the Joint Chiefs of Staff or any of the armed forces was added in the 1956 amendments. The 1958 amendments removed the provision that the Chairman could have no vote in a context where Congress realized the Joint Chiefs did not function by vote.

The language "(including any subject for the agenda recommended by the Joint Chiefs of Staff)," and "and determine when issues under consideration shall be decided" were added in 1984.

The Nichols Bill (H.R. 3718) would delete the phrase "(including any subject for the agenda recommended by the Joint Chiefs of Staff)" and would add three specified statutory duties:

- to provide military advice in his own right to the President, the National Security Council and the Secretary of Defense;
- to serve in the national military chain of command pursuit to section 124(c) of this title (10 U.S.C.); and
- to serve as a member of the National Security Council (statutory language implementing this function would also remove the prohibition on military command for participation in the chain of command as provided by 10 U.S.C. § 124).

The Administration bill of April 18, 1983, would also have the effect of formally inserting the Chairman in the operational chain of command.

10. The Organization of the Joint Chiefs of Staff (including the Joint Staff)

a. statutory and regulatory basis

The Organization of the Joint Chiefs of Staff (OJCS) in general terms consists of the Joint Chiefs of Staff, the Chairman of the Joint Chiefs, the Joint Staff, the Director of the Joint Staff, representatives reporting to or through the Joint Chiefs, and assistants to the Chairman. The current statutory authority for the Joint Staff is contained in 10 U.S.C. §143 which provides:

143. Joint Staff

(a) (1) There is under the Joint Chiefs of Staff, a Joint Staff consisting of not more than 400 officers selected by the Chairman of the Joint Chiefs of Staff. The Joint Staff shall be selected in approximately equal number from--

(A) the Army;
(B) the Navy and the Marine Corps; and
(C) the Air Force.

(2) Selection of officers of an armed force to serve on the Joint Staff shall be made by the Chairman from a list of officers submitted by that armed force. Each officer whose name is submitted shall be among those officers considered to be the most outstanding officers of that armed force. The Chairman may specify the number of officers to be included on any such list.

(3) The tenure of the members of the Joint Staff is subject to the approval of the Chairman of the Joint Chiefs of Staff.

(b) The Chairman of the Joint Chiefs of Staff in consultation with the Joint Chiefs of Staff, and with the approval of the Secretary of Defense, shall select the Director of the Joint Staff.

(c) The Joint Staff shall perform such duties as the Joint Chiefs of Staff or the Chairman prescribes. The Chairman of the Joint Chiefs of Staff manages the Joint Staff and its Director, on behalf of the Joint Chiefs of Staff.

(d) The Joint Staff shall not operate or be organized as an overall Armed Forces General Staff and shall have no executive authority. The Joint Staff may be organized and may operate along conventional staff lines to support the Joint Chiefs of Staff in discharging their assigned responsibilities.

(e) An officer who is assigned or detailed to duty on the Joint Staff may not serve a tour of duty of more than four years. An officer completing a tour of duty with the Joint Staff may not be assigned or detailed to duty on the Joint Staff within two years after relief from that duty except with the approval of the Secretary. This subsection does not apply in time of war declared by Congress or in time of national emergency declared by the President.[20]

In addition, 10 U.S.C. § 646 provides:

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[20] For a discussion of service attitudes toward joint service and the Joint Staff see Henry, Masland & Radway, *Armed Forces Unification and the Pentagon Officer*, 15 PUB. ADMIN. REV. 173 (1955).

646 Consideration of performance as a member of the Joint Staff

The Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, shall ensure that officer personnel policies of the Army, Navy, Air Force, and Marine Corps concerning promotion, retention, and assignment give appropriate consideration to the performance of an officer as a member of the Joint Staff.

(b) general discussion

The Joint Staff, as originally mandated under the National Security Act of 1947, was limited to 100 officers. The 1949 Amendments raised that to 210 officers. The 1953 amendments of Reorganization Plan No. 6 provided that the selection and tenure of the Director of the Joint Staff by the Joint Chiefs "shall be subject to the approval of the Secretary of Defense" and that the selection and tenure of the members of the Joint Staff of the Joint Chiefs "shall be subject to the approval of the Chairman . . . ." The 1958 Amendments raised the Joint Staff Officer limit to 400, generally placed a three year limit for service on the Joint Staff and as Director (except in time of war), provided that the Director would be selected by the Chairman of the Joint Chiefs in consultation with the Chiefs and with the approval of the Secretary of Defense, permitted the Chairman to prescribe duties to the Joint Staff along with the preexisting authority in the Joint Chiefs to do so, provided that the Chairman manages the Joint Staff and the Director "on behalf of the Joint Chiefs of Staff" and added the prohibition on operation or organization as "an overall Armed Forces General Staff" while providing that "[t]he Joint Staff may be organized and may operate along conventional staff lines to support the Joint Chiefs of Staff in discharging their assigned responsibilities." After a lengthy Congressional discussion of OJCS, the 1984 amendments in the Defense Authorization Act of 1985 changed the authority to appoint the Joint Staff from the "Joint Chiefs of Staff with the approval of the Chairman" to "the Chairman." It also added a new provision intended to enhance the professionalism of officers selected for service on the Joint Staff and it modified the general three year limitation on tenure of the Staff and the Director to four years with certain other changes. 10 USC § 646 was added in 1984 as part of the general Congressional effort to raise the standards of the Joint Staff and to enhance incentives to serve on that staff.

The Nichols Bill (H.R. 3718) would amend the language concerning the role of the Chairman in managing the Joint Staff by deleting the phrase "in the performance of those duties," would add a role for the Joint Staff in support of the Chairman as well as in support of the Joint Chiefs, and would make certain other charges.

The Administration bill of April 18, 1983, proposes modifications in the statutory restrictions on the Joint Staff specifically designed to improve the functions of that organization. One modification would have eliminated "the artificial limit of 400 officers in the Joint Staff."[21] According to AFSC Publication 1 "[t]he OJCS consists of approximately 1,380 people. Of these 1,380, about 730 are officers . . . ."[22] The Joint Staff, however, as but one part of OJCS, seems to be felt to be within the 400 officer ceiling. The legal basis for this determination as to what part of OJCS constitutes the Joint Staff within the statutory officer ceiling has apparently been worked out as a pragmatic exercise.

11. The Service Secretaries

a. statutory and regulatory basis

The Secretary of War and the Secretary of the Navy were established in the 1789 and 1798 acts creating the War and Navy Departments. The modern charter for the Service Secretaries, together with creation of the Secretary of the Air Force, began with the National Security Act of 1947. Current statutory authority for the Service Secretaries is provided by 10 U.S.C. § 3012 (the Army), 10 U.S.C. § 5031 (the Navy), and 10 U.S.C. § 8012 (the Air Force).

10 U.S.C. § 3012 provides:

> **3012. Secretary of the Army: power and duties; delegation by**
>
> (a) There is a Secretary of the Army, who is the head of the Department of the Army.
>
> (b) The Secretary is responsible for and has the authority necessary to conduct all affairs of the Department of the Army, including--
>
> (1) Functions necessary or appropriate for the training, operations, administration, logistical support and maintenance, welfare, preparedness, and effectiveness of the Army, including research and development;
>
> (2) direction of the construction, maintenance, and repair of buildings, structures, and utilities of the Army;
>
> (3) acquisition of all real estate and the issue of licenses in connection with Government reservations;
>
> (4) operation of water, gas, electric , and sewer utilities; and
>
> (5) such other activities as may be prescribed by the President or the Secretary of Defense as authorized by law.
>
> He shall perform such other duties relating to Army affairs, and conduct the business of the Department in such manner, as the President or the Secretary of Defense may prescribe. The Secretary is responsible to the Secretary of Defense for the operation and efficiency of the Department.

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[21] See the letter of May 1983 from Secretary of Defense Caspar W. Weinberger to Representative Bill Nichols supporting the Administration's legislative proposal on the organization of the Joint Chiefs of Staff, at 5.

[22] At 2-7.

After first informing the Secretary of Defense, the Secretary may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate.

(c) The Secretary may assign such of his duties as he considers appropriate to the Under Secretary of the Army and to the Assistant Secretaries of the Army. Officers of the Army shall , as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or an Assistant Secretary.

(d) The Secretary or, as he may prescribe, the Under Secretary or an Assistant Secretary shall supervise all matters relating to--

(1)the procurement activities of the Department of the Army; and

(2) planning for the mobilization of materials and industrial organizations essential to the wartime needs of the Army.

(e) The Secretary, as he considers appropriate, may assign, detail, and prescribe the duties of members of the Army and civilian personnel of the Department of the Army.

(f) The Secretary may change the title of any other officer, or of any activity, of the Department of the Army.

(g) The Secretary may prescribe regulations to carry out his functions, powers, and duties under this title.

10 U.S.C. 5031 provides:

5031. Secretary of the Navy: responsibilities

(a) There is a Secretary of the Navy, who is the head of the Department of the Navy. He shall administer the Department of the Navy under the direction, authority, and control of the Secretary of Defense. The Secretary is responsible to the Secretary of Defense for the operation and efficiency of the Department. After first informing the Secretary of Defense, the Secretary may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate.

(b) The Secretary of the Navy shall execute such orders as he receives from the President relative to--

(1) the procurement of naval stores and material;

(2) the construction, armament, equipment, and employment of Naval vessels; and

(3) all matters connected with the Department of the Navy.

(c) The Secretary of the Navy has custody and charge of all books, records, and other property of the Department.

(d) The Secretary of the Navy may prescribe regulations to carry out his functions, powers, and duties under this title. The authority of the

Secretary under the preceding sentence is in addition to the authority of the Secretary under section 6011 of this title.

10 U.S.C. § 8012 provides:

8012. Secretary of the Air Force: powers and duties; delegation by

(a) There is a Secretary of the Air Force appointed from civilian life by the President, by and with the advice and consent of the Senate. The Secretary is the head of the Department of the Air Force.

(b) The Secretary is responsible for and has the authority necessary to conduct all affairs of the Department of the Air Force, including--

(1) functions necessary or appropriate for the training, operations, administration, logistical support and maintenance, welfare, preparedness, and effectiveness of the Air Force, including research and development; and

(2) such other activities as may be prescribed by the President or the Secretary of Defense as authorized by law.

He shall perform such other duties relating to Air Force affairs, and conduct the business of the Department in such manner, as the President or the Secretary of Defense may prescribe. The Secretary is responsible to the Secretary of Defense for the operation and efficiency of the Department. After first informing the Secretary of Defense, the Secretary may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate.

(c) The Secretary may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Air Force and to the Assistant Secretaries of the Air Force. Officers of the Air Force shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or an Assistant Secretary.

(d) The Secretary or, as he may prescribe, the Under Secretary or an Assistant Secretary shall supervise all matters relating to--

(1) the procurement activities of the Department of the Air Force;

(2) planning for the mobilization of materials and industrial organizations essential to the wartime needs of the Air Force; and

(3) activities of the reserve components of the Air Force.

(e) The Secretary, as he considers appropriate, may assign, detail, and prescribe the duties of the members of the Air Force and civilian personnel of the Department of the Air Force.

(f) The Secretary may prescribe regulations to carry out his functions, powers, and duties under this title.

(b) general discussion

The Service Secretaries exercise civilian control over the Military Departments subject to the authority of the Secretary of Defense. Prior to 1947 and from 1953 to 1958 they served in the channel for operational command. Since 1958 they have been by statute removed from that channel. They continue to retain authority to make independent recommendations to Congress after first informing the Secretary of Defense. The history of defense organization, however, has been to strongly affirm the authority of the Secretary of Defense over the Service Secretaries.

12. The Service Chief

(a) statutory and regulatory basis

The current statutory basis for the Chief of Staff, U.S. Army; the Chief of Naval Operations; the Commandant of the Marine Corps; and the Air Force Chief of Staff is codified in 10 U.S.C. § 3034 (the Army) § 5081 and § 5082 (the Navy), § 5201 (the Marine Corps) and § 8034 (the Air Force).

10 U.S.C. § 3034 for the Chief of Staff U.S. Army provides:

> **3034. Chief of Staff: appointment; duties**
>
> (a) The Chief of Staff shall be appointed by the President, by and with the advice and consent of the Senate, for a period of four years, from the general officers of the Army. He serves during the pleasure of the President. In time of war or national emergency declared by the Congress after December 31, 1968, he may be reappointed for a term of not more than four years.
>
> (b) The Chief of Staff, while so serving, has the grade of general without vacating his regular or reserve grade.
>
> (c) Except as otherwise prescribed by law and subject to section 3012(c) and (d) of this title, the Chief of Staff performs his duties under the direction of the Secretary of the Army, and is directly responsible to the Secretary for the efficiency of the Army, its preparedness for military operations, and plans therefor.
>
> (d) The Chief of Staff shall--
>
> (1) preside over the Army Staff;
>
> (2) send the plans and recommendations of the Army Staff to the Secretary, and advise him with regard thereto;
>
> (3) after approval of the plans or recommendations of the Army Staff by the Secretary, act as the agent of the Secretary in carrying them into effect;
>
> (4) exercise supervision over such of the members and organizations of the Army as the Secretary of the Army determines.

Such supervision shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders under section 124 of this title;

(5) perform the duties described for him by sections 141 and 171 of this title and other provisions of law; and

(6) perform such other military duties, not otherwise assigned by law, as are assigned to him by the President.

10 U.S.C. §§ 5081 and 5082, the statutory charter for the Chief of Naval operations, provide:

5081. Chief of Naval Operations: appointment; term of office; powers; duties

(a) There is a Chief of Naval Operations, appointed by the President, by and with the advice and consent of the Senate, to serve at the pleasure of the President, for a term of four years, from officers on the active-duty list in the line of the Navy, eligible to command at sea and not below the grade of rear admiral. In time of war or national emergency declared by the Congress after December 31, 1968, he may be reappointed for a term of not more than four years.

(b) The Chief of Naval Operations, while so serving, has the rank of admiral. He takes precedence above all other officers of the naval service, except an officer of the naval service who is serving as Chairman of the Joint Chiefs of Staff.

(c) Under the direction of the Secretary of the Navy, the Chief of Naval Operations shall exercise supervision over such of the members and organizations of the Navy and the Marine Corps as the Secretary of the Navy determines. Such supervision shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders under section 124 of this title.

(d) The Chief of Naval Operations is the principal naval adviser to the President and to the Secretary of the Navy on the conduct of war, and the principal naval adviser and naval executive to the Secretary on the conduct of the activities of the Department of the Navy.

5082. Chief of Naval Operations: coordinating duties

(a) To coordinate military operations and their support effectively, the Chief of Naval Operations, under the direction of the Secretary of the Navy, shall--

(1) determine the personnel and the material requirements of the operating forces, including the order in which ships, aircraft, surface craft, weapons, and facilities are to be constructed, maintained, altered, repaired, and overhauled and

(2) coordinate and direct the efforts of the bureaus and offices of the executive part of the Department of the Navy as may be necessary to make available and distribute, when and where needed, the personnel and material required.

(b) As used in this section, "operating forces" means the several fleets, sea-going forces, sea-frontier forces, district forces, and such of the shore establishment of the Navy and other forces and activities as may be assigned thereto by the President or the Secretary of the Navy.

10 U.S.C. § 5201, that statutory charter for the Commandant of the Marine Corps, provides:

5201. Commandant of the Marine Corps: appointment, duties

(a) There is a Commandant of the Marine Corps, appointed by the President, for a term of four years, by and with the advice and consent of the Senate, to serve at the pleasure of the President, from officers on the active-duty list of the Marine Corps, not below the rank of colonel. In time of war or national emergency declared by the Congress after December 31, 1968, he may be reappointed for a term of not more than four years.

(b) The Commandant of the Marine Corps, while so serving, has the rank of general.

(c)An officer who is retired while serving as Commandant of the Marine Corps, or who, after serving at least two and one-half years as Commandant, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the grade of general. The retired pay of such an officer shall be computed at the highest rates of basic pay applicable to him while he served in that office.

(d) Under the direction of the Secretary of the Navy, the Commandant of the Marine Corps shall exercise supervision over such of the members and organizations of the Marine Corps and Navy as the Secretary of the Navy determines. Such supervision shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders under section 124 of this title.

And 10 U.S.C. § 8034, the statutory charter for the Air Force Chief of Staff, provides:

8034. Chief of Staff: appointment; duties

(a) The Chief of Staff shall be appointed for a period of four years by the President, by and with the advice and consent of the Senate, from the general officers of the Air Force. He serves during the pleasure of the President. In time of war or national emergency declared by the Congress after December 31, 1968, he may be reappointed for a term of not more than four years.

(b) The Chief of Staff, while so serving, has the grade of general without vacating his regular or reserve grade.

(c) Except as otherwise prescribed by law and subject to section 8012(c) and (d) of this title, the Chief of Staff performs his duties under the direction of the Secretary of the Air Force, and is directly responsible to the Secretary for the efficiency of the Air Force, its preparedness for military operations, and plans therefor.

(d) The Chief of Staff shall--

(1) preside over the Air Staff;

(2) send the plans and recommendations of the Air Staff to the Secretary, and advise him with regard thereto;

(3) after approval of the plans or recommendations of the Air Staff by the Secretary, act as the agent of the Secretary in carrying them into effect;

(4) exercise supervision over such of the members and organizations of the Air Force as the Secretary of the Air Force determines. Such supervision shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders under section 124 of this title.

(5) perform the duties prescribed for him by sections 141 and 171 of this title and other provisions of law; and

(6) perform such other military duties, not otherwise assigned by law, as are assigned to him by the President.

(b) general discussion

The Service Chiefs exercise supervision over their respective military service (or the Marine Corps) under the direction of the civilian Service Secretaries. They also serve as statutory members of the Joint Chiefs of Staff.

Since the 1958 Amendments to the National Security Act of 1947 the Service Chiefs have not, as Service Chiefs as opposed to their role as members of the Joint Chiefs, been in the operational chain of command. Current law uniformly provides that their supervision of the military services "shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders . . . ." From 1947 to 1953 they served in the operational chain of command pursuant to the "executive agent" system of the Joint Chiefs and from 1953 to 1958, with the chain of command going through the civilian Service Secretaries and then the Service Chiefs, they were also included in the operational chain of command.

Because of the different historical origin of each of the Service Chiefs, there have been historical differences among their positions, a few of which remain. The nineteenth century War Department experience with lack of a general staff and with confused civilian control in terms of the clarity of the Secretary of War in the command chain, culminating in the confusion of the Spanish-American War, led to the Act of February 14, 1903, providing statutory basis for a Chief of Staff and a General Staff Corps and clarifying the command chain to unambiguously provide that the Chief of Staff reports to the Secretary of War. That Act, supported by Secretary of War Elihu Root, substituted the term "supervision" for "command" in the authority of the Army Chief of Staff, as it applied to operational as well as administrative matters. Without this same history, the Act of March 5, 1948, defining the duties of the Chief of Naval Operations used the term "command."[23] Similarly, the National Security Act of 1947 used the term "command" in creating the Office of the Chief of Staff of the Air Force and initially specifying the duties of that Office. The current language "supervision" was informally adopted for all Service Chiefs in the 1958 reorganization, apparently because of Congressional concern that the language "command" in the charters of the Navy and Air Force Service Chiefs was inconsistent with removing the Service Chiefs from the operational chain of command. That, of course, is one possible terminological convention, reserving the term "command" for the operational chain and using "supervision" for administrative matters. The distinction, however, is not necessary, in specifying separate combatant and administrative chains, or in unambiguously clarifying civilian control, and arguably it may cause some confusion in the administrative chain as it departs from ordinary usage of the term.

In terms of current differences in statutory charters, the Chief of Naval Operations and the Commandant of the Marine Crops exercise authority over such members and organizations of the Navy and Marine Corps as the Secretary of Navy, under whose direction both serve, determines. Also the Chief of Naval Operations is by statute "the principal naval adviser *to the President* and to the Secretary of the Navy on the conduct of war and the principal naval adviser and naval executive to the Secretary on the conduct of the activities of the Department of the Navy."[24] Although the other Service Chiefs do not seem to have a comparable statutory provision with respect to directly serving as adviser to the President, all serve as the principal military advisers to the President, the National Security Council and the Secretary of Defense in their second hat capacity as members of the Joint Chiefs.

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[23] See generally A. KING, *supra* note 3, at 56-70.

[24] Emphasis added.

In an effort to strengthen the Joint Chiefs of Staff by providing the Service Chiefs more time for Joint Chiefs duties, the 1958 Amendments encouraged delegation of service roles by the Service Chiefs to Vice Service Chiefs.[25]

13. The Military Departments (and service roles and missions)

a. statutory and regulatory basis

The current statutory basis for the Military Departments and, in general terms, service roles and missions, is codified in 10 U.S.C. §§ 3010 and 3062 (the Army); §§ 5011 and 5012 (the Navy); §§ 5013 (the Marine Corps); and §§ 8010 and 8062 (the Air Force).

10 U.S.C. §§ 3010 and 3062 for the Army provide:

> **3010. Organization.**
> The Department of the Army is separately organized under the Secretary of the Army. It operates under the authority, direction, and control of the Secretary of Defense.
>
> **3062. Policy; composition; organized peace establishment**
> (a) It is the intent of Congress to provide an Army that is capable, in conjunction with the other armed forces, of--
>
> (1) preserving the peace and security, and providing for the defense, of the United States, the Territories, Commonwealths, and possessions, and any areas occupied by the United States;
>
> (2) supporting the national policies;
>
> (3) implementing the national objectives; and
>
> (4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.

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[25] See, for example, with respect to the current statutory basis for a Vice Chief 10 U.S.C. § 5085 "Vice Chief of Naval Operations: Appointment; Powers; Duties," that provides:

> (a) There is a Vice Chief of Naval Operations, appointed by the President, by and with the advice and consent of the Senate, from officers on the active list in the line of the Navy serving in grades above captain and eligible to command at sea.
>
> (b) The Vice Chief of Naval Operations has such authority and duties with respect to the Department of the Navy as the Chief of Naval Operations, with the approval of the Secretary of the Navy, may delegate to or prescribe for him. Orders issued by the Vice Chief of Naval Operations in performing such duties have the same effect as those issued by the Chief of Naval Operations.
>
> (c) When there is a vacancy in the office of Chief of Naval Operations, or during the absence or disability of the Chief of Naval Operations, the Vice Chief of Naval Operations, unless otherwise directed by the President, shall perform the duties of the Chief until a successor is appointed or the absence or disability ceases.
>
> (d) The President may designate the Vice Chief of Naval Operations as an officer who performs special or unusual duty or duty of great importance and responsiblity under section 5231 of this title.

(b) In general, the Army, within the Department of the Army, includes land combat and service forces and such aviation and water transport as may be organic therein. It shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land. It is responsible for the preparation of land forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Army to meet the needs of war.

(c) The Army consist of--

(1) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve; and

(2) all persons appointed or enlisted in, or conscripted into, the Army without component.

(d) The organized peace establishment of the Army consists of all--

(1) military organizations of the Army with their installations and supporting and auxiliary elements, including combat, training, administrative, and logistic elements; and

(2) members of the Army, including those not assigned to units; necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency.[26]

10 U.S.C. §§ 5011 and 5012 for the Navy provide:

5011. Composition.

The Department of the Navy is separately organized under the Secretary of the Navy. It operates under the authority, direction, and control of the Secretary of Defense. It is composed of the executive part of the Department of the Navy; the Headquarters, United States Marine Corps; the entire operating forces, including naval aviation, of the United States Marine Corps, and the reserve components of those operating forces; and all field activities, headquarters, forces, bases, installations, activities, and functions under the control or supervision of the Secretary of the Navy. It includes the United States Coast Guard when it is operating as a service in the Navy.

5012. United States Navy: composition; functions

(a) The Navy, within the Department of the Navy, includes, in general, naval combat and service forces and such aviation as may be organic therein. The Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and is generally responsible for naval reconnaissance, antisubmarine warfare, and protection of shipping.

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[26] 10 U.S.C. § 3062.

(b) All naval aviation shall be integrated with the naval service as part thereof within the Department of the Navy. Naval aviation consists of combat and service and training forces, and includes land-based naval aviation, air transport essential for naval operations, all air weapons and air techniques involved in the operations and activities of the Navy, and the entire remainder of the aeronautical organization of the Navy, together with the personnel necessary therefor.

(c) The Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements. Matters of joint concern as to these functions shall be coordinated between the Army, the Air Force, and the Navy.

(d) The Navy is responsible, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.

10 U.S.C. § 5013 for the Marine Corps provides:

5013. United States Marine Corps: composition; functions

(a) The Marine Corps, within the Department of the Navy, shall be so organized as to include not less than three combat divisions and three air wings, and such other land combat, aviation, and other services as may be organic therein. The Marine Corps shall be organized, trained, and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign. In addition, the Marine Corps shall provide detachments and organizations for service on armed vessels of the Navy, shall provide security detachments for the protection of naval property at naval stations and bases, and shall perform such other duties as the President may direct. However, these additional duties may not detract from or interfere with the operations for which the Marine Corps is primarily organized.

(b) The Marine Corps shall develop, in coordination with the Army and the Air Force, those phases of amphibious operations that pertain to the tactics, technique, and equipment used by landing forces.

(c) The Marine Corps is responsible, in accordance with integrated joint mobilization plans, for the expansion of peacetime components of the Marine Corps to meet the needs of war.

10 U.S.C. §§ 8010 and 8062 for the Air Force provide:

8010. Organization

The Department of the Air Force is separately organized under the Secretary of the Air Force. It operates under the authority, direction, and control of the Secretary of Defense.

8062. Policy; composition; aircraft authorization

(a) It is the intent of Congress to provide an Air Force that is capable, in conjunction with the other armed forces, of--

(1) preserving the peace and security, and providing for the defense, of the United States, the Territories, Commonwealths, and possessions, and any areas occupied by the United States;

(2) supporting the national policies;

(3) implementing the national objectives; and

(4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.

(b) There is a United States Air Force within the Department of the Air Force.

(c) In general, the Air Force includes aviation forces both combat and service not otherwise assigned. It shall be organized, trained, and equipped primarily for prompt and sustained offensive and defensive air operations. It is responsible for the preparation of the air forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Air Force to meet the needs of war.

(d) The Air Force consists of--

(1) the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve;

(2) all persons appointed or enlisted in, or conscripted into, the Air Force without component; and

(3) all Air Force units and other Air Force organizations, with their installations and supporting and auxiliary combat, training, administrative, and logistic elements; and all members of the Air Force, including those not assigned to units; necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency.

(e) Subject to subsection (f) of this section, chapter 831 of this title, and the strength authorized by law pursuant to section 138 of this title, the authorized strength of the Air Force is 70 Regular Air Force groups and such separate Regular Air Force squadrons, reserve groups, and supporting and auxiliary regular and reserve units as required.

(f) There are authorized for the Air Force 24,000 serviceable aircraft or 225,000 airframe tons of serviceable aircraft, whichever the Secretary of the Air Force considers appropriate to carry out this section. This subsection does not apply to guided missiles.

In addition to this statutory basis, DOD Directive 5100.1 of May 1, 1985, "Functions of the Department of Defense and Its Major Components," which is the successor to the 1948 "Key West Agreement" or "Functions Paper," sets out a more specific division of the "Functions of the Military Departments and the Military Services."[27] JCS Publication 2 "Unified Action Armed Forces (UNAAF)" also includes provisions concerning functions of the Military Departments and Services.

(b) general discussion

The appropriate division of roles and missions between the Military Departments and Services historically has been one of the most sensitive issues in defense organization. The 1947 agreement of the War and Navy Departments to legislation creating a "National Military Establishment," which in 1949 became the Department of Defense, was predicated on President Truman issuing an Executive Order specifying the respective service roles and missions. Truman so informed the Congress which then itself established a general statutory charter for the services in the National Security Act of 1947. President Truman subsequently signed Executive Order 9877 on July 26, 1947, the same day that he signed the National Security Act of 1947. Secretary of Defense Forrestal subsequently proposed a revised Executive Order in light of the general statutory language in the National Security Act. Resulting disagreement among the Services about the appropriate statement of roles and missions following this new statutory basis and the proposed new Executive Order led to meetings with the Secretary of Defense in 1948 in Key West and Newport. The 1948 "Key West Agreement" or "Functions Paper" and subsequent agreements became the basis for revocation of Executive Order 9877 on April 21, 1948. The modern "Functions Paper", embodying a series of inter-service agreements on roles and missions, as well as changes in the law, is DOD Directive 5100.1 of May 1, 1985. Although the original draft Forrestal revision of Executive Order 9877 did not consider the functions of the Joint Chiefs, the 1948 "Functions Paper," and every successor to it, has dealt with the related issue of the functions of the Joint Chiefs as well as the divisions of service functions. Since 1948, DOD Directives have been the principal legal means for altering and clarifying service roles and missions within the general statutory mandate.

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[27] DOD Directive 5100.1 of May 1, 1985, at 5-11; and also including at pages 11-12 references to the DOD Directives setting the functions of DOD agencies. DOD Directive 5100.1 of May 1, 1985, is included in the annexes to this memorandum.

14. The Combatant Commands (the unified and specified command system)

(a) constitutional, statutory and regulatory basis

As will be developed in Sections V and VI of this memorandum, the President, and the Secretary of Defense when delegated authority by the President, have particularly strong constitutional powers with respect to the conduct of hostilities. Indeed, in some settings those powers are exclusive in the sense that presidential direction would prevail over inconsistent statutory provisions. Since 1958, however, there has also been a statutory basis for combatant commands. That statutory basis was provided at the request of President Dwight Eisenhower who sought to move the combatant channel of command from the Military Departments and to provide a clear chain of command from the Secretary of Defense to the unified and specified commanders through the Joint Chiefs of Staff. The current statutory basis for the combatant commands is codified in 10 U.S.C. § 124, which provides:

> **124. Combatant commands: establishment; composition; functions; administration and support**
>
> (a) With the advice and assistance of the Joint Chiefs of Staff, the President, through the Secretary of Defense, shall--
>
> (1) establish unified combatant commands or specified combatant commands to perform military missions; and
>
> (2) prescribe the force structure of those commands.
>
> (b) The military departments shall assign forces to combatant commands established under this section to perform the missions of these commands. A force so assigned is under the full operational command of the commander of the command to which it is assigned. It may be transferred from the command to which it is assigned only by authority of the Secretary and under procedures prescribed by the Secretary with the approval of the President. A force not so assigned remains, for all purposes, in the military department concerned.
>
> (c)(1) Combatant commands established under this section are responsible to the President and to the Secretary for such military missions as may be assigned to them by the Secretary with the approval of the President.
>
> (2) Subject to the authority, direction and control of the Secretary, the Chairman acts as the spokesman for the commanders of the combatant commands on operational requirements.
>
> (d) Subject to the authority, direction, and control of the Secretary, each military department is responsible for the administration of forces assigned by that department to combatant commands established under this section. The Secretary shall assign the responsibility for the support of

> forces assigned to those commands to one or more of the military departments.

This statutory provision should be read with 10 U.S.C. §§ 3034, 5081, 5201 and 8034 which provide that the authority of the Service Chiefs in supervision of their military service "shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders . . . ."

In addition to the statutory basis for unified and specified commands, DOD Directives 5100.1 and 5158.1 of May 1, 1985 and 5100.30 of December 2, 1971 provide a more specific interface between this statutory provision and those establishing the duties of the Joint Chiefs with respect to the role of the Joint Chiefs (and the Chairman in time-sensitive settings) in the combatant chain of command. And JCS Publication 2 "Unified Action Armed Forces (UNAAF)," as periodically updated, sets forth more detailed "principles, doctrines, and functions governing the activities and performance of the Armed Forces of the United States when two or more Services or elements thereof are acting together."[28]

Of particular importance, DOD Directive 5100.1 of May 1, 1985, provides with respect to the role of the Joint Chiefs in the operational chain of command:

> In performance of their functions of advising and assisting the Secretary of Defense, and subject to the authority and direction of the President and the Secretary of Defense, it shall be the duty of the Joint Chiefs of Staff to:
>
> 1. Serve as advisers and as military staff in the chain of operational command with respect to Unified and Specified Commands, to provide a channel of communications from the President and Secretary of Defense to Unified and Specified Commands, and to coordinate all communications in matters of joint interest addressed to the commanders of the Unified or Specified Commands by other authority.
> 2. Prepare strategic plans and provide for the strategic direction of the armed forces, including the direction of operations conducted by commanders of Unified and Specified Commands and the discharge of any other function of command for such commands directed by the Secretary of Defense.[29]

DOD Directive 5100.30 of December 2, 1971 also provides:

> The chain of command runs from the President to the Secretary of Defense and through the Joint Chiefs of Staff to the commanders of Unified and Specified Commands. The channel of communication for execution of the Single Integrated Operational Plan (SIOP) and other time-sensitive

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[28] JCS Pub. 2 of October 1, 1974 at JCS Pub. 2, Change 1, at 3. The last change in JCS Pub. 2, which is periodically updated, was December 1, 1984.

[29] DOD Directive 5100.1 of May 1, 1985, at 3-4.

> operations shall be from the NCA through the Chairman of the Joint Chiefs of Staff, representing the Joint Chiefs of Staff, to the executing commander.[30]

Footnote 1 to this Directive provides:

> The expression, "Chairman of the Joint Chiefs of Staff," as used in this directive includes the officer appointed to this position and the officer serving in this position in the appointee's absence.[31]

(b) general discussion

As has been seen, major statutory provision for unified and specified commands was introduced with the 1958 Eisenhower Amendments to the National Security Act of 1947. The 1947 Act, however, did establish a rudimentary statutory basis for unified commands by listing as a duty of the Joint Chiefs, subject to the authority and direction of the President and the Secretary of Defense, "to establish unified commands in strategic areas when such unified commands are in the interest of national security . . . ."

In an effort to strengthen the voice of the operational commanders, the 1984 Amendments added the language of § 124c(2):

> (2) Subject to the authority, direction and control of the Secretary, the Chairman acts as the spokesman for the commanders of the combatant commands on operational requirements.

The Nichols Bill (H.R. 3718) would substitute the following language in place of the present § 124c(2):

> (2) The National Military chain of command runs from the President to the Secretary and through the Chairman of the Joint Chiefs of Staff to the combatant commands. Orders to combatant commands shall be issued by the President or the Secretary through the Chairman of the Joint Chiefs of Staff.
>
> (3) Subject to the authority, direction, and control of the Secretary, the Chairman supervises the commanders of the combatant commands and acts as their spokesman on operational requirements.[32]

The basic structure of operational and administrative command, following the 1958 Amendments, is that the operational chain of command runs from the President and

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[30] *World-Wide Military Command and Control System* (WWMCCS), DOD Directive No. 5100.30 (Dec. 2, 1971), at 1-2.

[31] Id. at 2 n. 1.

[32] H.R. 3718.

Secretary of Defense through the Joint Chiefs to the commanders of the unified and specified commands. Those commanders exercise "full operational command." Administrative and support matters, however, are handled in the administrative chain of command running from the President and Secretary of Defense through the Service Secretaries and Service Chiefs.

Since the division between "operational" or "combatant" matters on the one hand, and "administrative" or "support" matters on the other, is not defined in the statutory framework; it is not surprising that this complex matter has been dealt with by Executive Order and currently by DOD Directives and JCS Publication 2. The Secretary of Defense would seem to have adequate legal authority to define the intersection between "operational" and "administrative" matters on both constitutional and statutory grounds. For example, just to examine one basis of the Secretary of Defense's legal authority in this area, Section 124 itself would seem to permit resolution of ambiguities simply by defining the "military mission" of the unified or specified commands. That can be done by the President, through the Secretary of Defense with the advice and assistance of the Joint Chiefs.

15. The Armed Forces Policy Council

(a) statutory and regulatory basis

The Armed Forces Policy Council is the successor to the War Council created by the National Security Act of 1947. 10 U.S.C. § 171, the current statutory basis for the Policy Council, provides:

> **171. Armed Forces Policy Council**
>
> (a) There is in the Department of Defense an Armed Forces Policy Council consisting of--
>
> (1) the Secretary of Defense, as Chairman, with the power of decision;
> (2) the Deputy Secretary of Defense;
> (3) the Secretary of the Army;
> (4) the Secretary of the Navy;
> (5) the Secretary of the Air Force;
> (6) the Under Secretaries of Defense;
> (7) the Chairman of the Joint Chiefs of Staff;
> (8) the Chief of Staff of the Army;
> (9) the Chief of Naval Operations;
> (10) the Chief of Staff of the Air Force; and
> (11) the Commandant of the Marine Corps.
>
> (b) The Armed Forces Policy Council shall advise the Secretary of Defense on matters of broad policy relating to the armed forces and shall consider and report on such other matters as the Secretary of Defense may direct.

(b) general discussion

The Armed Forces Policy Council is a council of the principals of the Department of Defense available to the Secretary of Defense for advice on such matters as the Secretary may direct. It would also seem a forum in which any such principal could raise "matters of broad policy relating to the armed forces . . . ."

The War Council created by the National Security Act of 1947 became the Armed Forces Policy Council in the National Security Act Amendments of 1949. Those amendments also added the newly created Deputy Secretary of Defense and Chairman of the Joint Chiefs to the Council. The 1958 Amendments added the Director of Defense Research and Engineering but this addition was changed in 1977 to the current provision "the Under Secretaries of Defense." The Commandant of the Marine Corps was the latest addition in 1983.

C. Analysis of Selected Contemporary Issues

1. general discussion

Current defense organization is supported in law by the existing constitutional, statutory and regulatory framework. Most defense organization today has an explicit statutory--as well as constitutional--basis and supplemental Department of Defense directives would seem to be within the constitutional and statutory authority of the President and Secretary of Defense. Nevertheless, there are some areas where the legal framework is fuzzy or frayed at the edges and there is at least one statutory provision--incorporating a one-house "legislative veto"--that is highly likely to be at least in part unconstitutional. Moreover, as Sections V and VI of this memorandum will discuss, unless the President is assumed in settings of hostilities to have substantial constitutional ability to modify defense organization, and particularly the operational command structure, statutory constraints in such settings could well be a violation of an exclusive power of the President as Commander-in-Chief.

Many statutory provisions concerning defense organization provide flexibility to the President in times of war, or hostilities, or national emergency. It might be useful to consider a general provision that would provide such flexibility across the board in settings of hostilities or imminent threat of hostilities for matters related to effective exercise of the Commander-in-Chief power. The practice in both World War I and II was for Congress to virtually immediately provide the President with great flexibility in defense organization.[33]

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[33] "By the Overman Act of May 20, 1918, Congress authorized the President to redistribute functions, consolidate offices and agencies, and transfer duties and powers during the first World War then in progress with respect to matters relating to its conduct . . . ." A. KING, *supra* note 3, at 73. "On December 18, 1941, only eleven days after the attack on Pearl Harbor, Congress enacted Title I of the First War Powers Act, substantially a reenactment of the Overman Act of the First World War, which authorized the President to redistribute functions, transfer duties, and consolidate offices, for the better conduct of the war." *Id.* at 85.

Today a defense emergency could arise with even less warning and greater consequences than in World War II.[34] Moreover, today more of the structure of defense organization is based on statute. Nothing could be more debilitating to a national effort to successfully prosecute hostitilities than a serious legal dispute between Congress and the President during the course of hostilities. All such provisions for added flexibility should be tied to "hostilities or imminent threat of hostilities" rather than to "declared war," a formality generally not followed in the post-United Nations Charter era.[35]

The provision in current defense organization law that is highly likely to be unconstitutional, at least in part, is 10 U.S.C. § 125, which establishes a procedure for a one-house veto on certain transfers, reassignments and consolidations of combatant functions, powers, or duties assigned by statute to the military services. This provision, intended by Congress as a check on the power of the Secretary of Defense in relation to the Military Services, would seem to violate the bicameral and presentment requirements of the Constitution as interpreted in the 1983 Supreme Court decision of *I.N.S. v. Chadha*, which is discussed in Section VI of this memorandum. The interesting issues after *Chadha* would seem to be whether only the offending portion of the statute, or all of it, would fall as a result of the invalid procedural structure contained within it; and what would be the implications of this regarding the powers of the Secretary of Defense with respect to discretionary authority previously subject to the legislative veto. Transfers not covered by this procedure, and falling within the exceptions of Section 125, would not seem to be affected.

Areas of current organization authorized by the existing legal framework but where that framework may be fuzzy at the edges, include the meaning of "full operational command" for the operational commands or more meaningfully the functional differentiation of "operational" or "combatant" functions, on the one hand, from "administrative" or "supply" functions on the other, as provided by differing provisions of defense organization law. They also include the possible desirability of spelling out a clearer basis for the Chairman of the Joint Chiefs to serve in the combatant chain of command in time-sensitive settings. 10 U.S.C. § 142 continues to provide that the Chairman "may not exercise military command over . . . any of the armed forces." DOD Directive 5100.30 places the Chairman in the chain of command for the SIOP and other time-sensitive operations only by talking about the "channel of communication" and the Chairman as "representing the Joint Chiefs of Staff." If, however, a setting is truly time-sensitive, "representation" and "communication" only would not seem adequate to handle unforseen contingencies. Statutory clarification of the role of the Chairman of the Joint Chiefs for time-urgent operational matters would be a compromise between those who would prefer a broader role for the Chairman in the operational chain of command, as in the Nichols Bill, and those who prefer the current statutory provisions. It would also have the virtue of conforming with what seems to be present practice.

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[34] Indeed, since as we discuss in Sections V and VI the next war will likely be a "come as you are" affair, prudence--supported at minimum by the spirit of the Constitution--suggests that the President have considerable flexibility to reorganize the "command" side of the Defense structure even in time of peace. His role as Commander-in-Chief is not, by the Constitution, limited to time of war or emergency.

[35] One specific statutory issue, related to presidential flexibility, and which might be cured by a general provision for presidential flexibility, is the existence of differing provisions for terms of office for the Service Chiefs *vis-à-vis* the Chairman of the Joint Chiefs--specifically presidential flexibility to extend them.

Finally, members of the Blue Ribbon Commission might want to be alert to the arguably sometimes unnecessary current statutory sensitivity to use of the phase "command" or being in the "chain of command" both with respect to existing language of "supervision" in dealing with the administrative chain and the role of the Joint Chiefs in the operational chain of command. It is, of course, imperative in our democratic system that military commanders be fully subject to civilian authority. That issue, however, as well as clear specification of differing chains of command, can be unambiguously resolved without removing military professionals from their primary function of "command," within a chain clearly dependent on civilian authority. Although the present structure is probably acceptable in this regard, it is possible that if the "command" and "chain of command" functions of top military leaders become too uncertain the result could be a disastrous failure to exercise military judgment when necessary and consistent with general civilian direction. One argument for retention of the language "supervision" in the administrative chain, of course, is to offer yet another modality of emphasizing the combatant chain of command and differentiating it from the administrative chain. The history of defense organization has been in part a struggle for civilian authority, and since the passage of the National Security Act of 1947 a twin thrust to consolidate the authority of the Secretary of Defence over the Military Departments and to vitalize a meaningful unified operational command structure, as well as to seek to meet the ever present challanges of defense management and cutting edge research and development. Some continuing attention to the structure of the system for ensuring the best military advice in handling today's complex politico-military matters, and particularly the conduct of hostilities, would also seem appropriate. Focus on ensuring such professional military advice to civilian leaders, particularly the President and the Secretary of Defense, as well as ensuring continuing top-level military strategic direction of combatant operations, is a largely neglected focus in defense organization.

2. The Office of the Secretary of Defense

Much of the thrust of defense reorganization since the National Security Act of 1947 has been to consolidate the authority of the Secretary of Defense over all components of the Defense Department. That would seem to have been clearly achieved.

Perhaps one issue for the current era is whether the organization of the Office of the Secretary of Defence by management functions, such as research and manpower, should be supplemented to any extent with a strategic mission oriented functional division as well? Should we, for example, seek to broaden options for dealing with sustained low-intensity conflict against the democracies and their allies by adding a functional cross-cutting office focussed on politico-military planning for low-intensity conflict and the important public affairs aspects of low-intensity conflict settings? If such an office did not transfer major combatant functions or create new Assistant Secretary or higher positions, it would seem to be within the authority of the Secretary to establish on his own. If, however, any new mission-oriented functional divisions were sought to be established at the level of Assistant Secretary or higher it would seem to be preferable, if not legally mandatory, that such changes be brought about by statute. And if such changes were to seek to transfer major combatant functions, under existing law after *Chadha* there would be sufficient uncertainty that it would seem at least political unwise to make such a change without legislation.

3. The role of the Chairman of the Joint Chiefs of Staff

A principal focus of congressional interest in defense organization within the last few years, particularly on the House side, has been the role of the Chairman of the Joint Chiefs. The Nichols Bill would increase the authority of the Chairman in a number of respects including placing the Chairman, as opposed to the Joint Chiefs, in the general (not just time-sensitive) operational chain of command[36] and making the Chairman a formal member of the National Security Council. For the most part, these are policy issues that should be judged by cost benefit assessment of how clearly identified goals are served by the current system and proposed changes. They do not generally raise legal issues under current defense organization except with respect to possible modalities of any such change.

In one respect, however, proposals to enhance the role of the Chairman of the Joint Chiefs intersect a possible ambiguity in the current legal structure. 10 U.S.C. § 142, the statutory mandate for the Chairman, prohibits the Chairman from exercising "military command over . . . any of the armed forces." Yet DOD Directive 5100.30, obviously responding to a felt need, places the Chairman in the operational chain of command for execution of the SIOP "and other time-sensitive operations" but only in a capacity "representing the Joint Chiefs of Staff." When executing pre-existing plans of the Joint Chiefs, of course, such a role by the Chairman would and should be representational. If a time-urgent setting, however, were to present a new problem calling for independent judgment then the role of the Chairman is only distantly "representational." In such a setting it may be preferable to clearly understand the command function of the Chairman rather than serving only as a "channel of communication." This latter differention is marginal in any event since JCS Publication 1 defines "channel of command" as identical with "chain of command." The flat prohibition on the Chairman with respect to the exercise of military command may also be somewhat inconsistent with his role under 10 U.S.C. § 141 as a *member* of the Joint Chiefs who clearly are in the operational chain of command. Thus, it might well be preferable to clearly reflect, through appropriate statutory change, the role of the Chairman in the operational chain of command for time-sensitive settings or even just those requiring departure from Joint Chiefs contingency plans as well possibly as his strategic command role as a member of the Joint Chiefs. Such a change would clarify current law to conform more closely with what seems to be current procedure within the Joint Chiefs.

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[36] Similarly, the 1985 study by the Georgetown Center for Strategic and International Studies (CSIS) would "designate the chairman of the Joint Chiefs of Staff (JCS) as the principal military adviser to the President, the Secretary of Defense, and the National Security Council--replacing the corporate JCS in that role." See CSIS, TOWARD A MORE EFFECTIVE DEFENSE: THE FINAL REPORT OF THE CSIS DEFENSE ORGANIZATION PROJECT (Feb. 1985).

4. The roles of the Joint Chiefs of Staff and the Chairman of the Joint Chiefs in the operational chain of command

In enacting the 1958 Amendments to the National Security Act of 1947, both President Eisenhower and the Congress clearly contemplated that the Joint Chiefs would play a substantial role in the newly clarified operational chain of command. Section III(B)4 of this memorandum has already examined the legislative history of that intention. Yet 10 U.S.C. § 141, the current statutory charter for the Joint Chiefs, embodies only the vague language of "provide for the strategic direction of the armed forces" to encompass this important function. Section 141 also provides that the Joint Chiefs shall "perform such other duties as the President or the Secretary of Defense may prescribe." Pursuant to these statutory provisions, as well as their statutory authority as the principal military advisers to the President and Secretary of Defense, and the President's and Secretary of Defense's own constitutional authority, the Secretary of Defense has promulgated DOD Directives 5100.1 of May 1, 1985 and 5100.30 of December 2, 1971 providing a more specific role for the Joint Chiefs in the chain of command. Even some language used in those directives such as "through the Joint Chiefs" is arguably weaker than intended by President Eisenhower and the Congress. As such, one legal issue that might be carefully examined by the President's Blue Ribbon Commission is the desirability of clarifying 10 U..S.C. § 141 to more accurately reflect a legitimate and important strategic command function for the Joint Chiefs in the operational chain of command, always, of course, subject to the civilian authority and direction of the President and the Secretary of Defense. In this connection it should be noted that the Nichols Bill would alter 10 U.S.C. § 124c(2), the Charter for unified and specified commands, by specifying that "[t]he National Military chain of command runs from the President to the Secretary and through the Chairman of the Joint Chiefs of Staff to the combatant commands. Orders to combatant commands shall be issued by the President or the Secretary through the Chairman of the Joint Chiefs of Staff." It is not, of course, necessary to substitute the Chairman for the Joint Chiefs to clarify the operational command function of the Joint Chiefs.

The possible ambiguity concerning the role of the Chairman of the Joint Chiefs in time-sensitive settings has been discussed under the last heading in this memorandum and will not be repeated here. It is significant, however, that present statutory language may be weaker than desirable or than intended by Congress in dealing with both the role of the Chairman and that of the Joint Chiefs in the operational chain of command.

5. The authority of operational commanders

The statutory charter for unified and specified commands, 10 U.S.C. § 124, provides that commanders of such commands shall have "full operational command."

Similarly, the statutory charter for the Service Chiefs indicates that their "supervision" over their Military Service "shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders under section 124 of this title."[37] But Section 124 does not define "full operational command." Even more importantly, Section 124 also provides:

> Subject to the authority, direction, and control of the Secretary, each military department is responsible for the administration of forces assigned by that department to combatant commands established under this section. The Secretary shall assign the responsibility for the support of forces assigned to those commands to one or more of the military departments.[38]

Any lawyer familiar with the contributions of the legal realists will recognize this as a classic example of complimentarity in which a legal framework embodies potentially conflicting directions.[39] If the matter is "operational" or involves "combatant" command the operational commander has command. If, however, it is "administrative" or "supporting" in nature the military departments have supervisory authority. In resolving this dilemma a Court might weight the language "full" before operational command to resolve marginal cases in favor of the operational chain and it would certainly look to the purpose of Section 124 which was strongly motivated by a need to have a clear chain of command to unified operational commands. Using all modern interpretive tools, however, substantial grey-areas would remain. These issues, of course, are not likely to be resolved in Court.

As a practical matter, the generality of the statutory language for resolving "operational" versus "administrative" functions in the area of defense organization has left grey-area solutions to the pragmatic functioning of the system through, for example, gap filling DOD Directives or JCS Publications. In examining this issue, the Commission might want to examine whether there are any functions currently treated as administrative or operational that should be treated as the other by statute or DOD Directive. Resolution of that question depends on assessment of costs and benefits in relation to identified goals as to why an issue is best handled in an operational or administrative chain. Such goals would seem likely to include the great importance of success in combatant operations and the advantages of any efficiencies in centralized performance of specialized administrative and support functions.

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[37] See 10 U.S.C. §§ 3034 (the Army), 5081 (the Navy), 5201 (the Marine Corps), and 8034 (the Air Force).

[38] 10 U.S.C. § 124(d)(emphasis added).

[39] Complementarity is a feature of many of our most important laws, including the Constitution of the United States and the United Nations Charter. The discussion of the war powers of the President and Congress in part V of this memorandum provides an illustration.

6. Modalities of organizational change and flexibility of current law

There are several modalities of change in defense organization. These include statutory change, Executive Order, DOD Directive, or more informal JCS Publications or regulations.

As a matter of law, any change may be made by the normal legislative process unless beyond the constitutional powers of Congress. In the area of defense organization that rules out any provisions that would be inconsistent with the Commander-in-Chief power of the President, or that would violate the procedural constitutional rules of presentment and bicameralism. Provided they do not tie the hands of the President in the conduct of hostilities, or utilize a legislative veto to control congressional delegations of authority, most statutes in this area are likely to be constitutional. Certainly this is one area where Congress can constitutionally delegate broad authority to the President or Secretary of Defense.[40] Well known drawbacks of the full legislative process are the time and effort required, and the uncertainty of the outcome.

The President by Executive Order or the Secretary of Defense acting pursuant to Presidential authority or his own authority through DOD Directives can exercise substantial authority. Such orders and directives must be rooted in the constitutional authority of the President or statutory authority of the President or Secretary of Defense. And they must not be inconsistent with existing legislation unless promulgated pursuant to an exclusive Presidential power, such as conduct of on-going hostilities.[41]

The starting point for assessing the authority of the Secretary of Defense to make changes in defense organization is 5 U.S.C. § 301, a general provision applying to the heads of all executive and military departments. Section 301 provides:

> **301. Departmental regulations**
>
> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property . . . .

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[40] This issue is discussed in Section VI of this memorandum.

[41] One somewhat puzzling issue discussed more fully in Section VI of this memorandum is that 5 U.S.C. §§ 901-912 provides a general statutory framework for presidential reorganization of executive departments and individual agencies. The 1977 law, prior to the *Chadha* decision, provided a broad delegation of authority to the President to reorganize subject to notification of Congress and a one-house veto. In 1984, following the *Chadha* decision, the Congress modified this provision to make it constitutional--and in doing so altered the law to require full approval by joint resolution (i.e., by statute, requiring a majority vote of both houses and signature by the President or a two-thirds majority in each house following a veto). The 1984 Amendments also, among other changes, prohibited renaming an executive department without a reorganization plan or creating a new agency outside of an existing executive department or independent agency. Presumably, the more specific provisions for defense organization and management in the statutory framework for defense organization would prevail over this general statute. This general reorganization framework may, however, in some respects create legal constraints on organizational change and it may, for some settings involving conduct of hostilities and defense organization, present a possible constitutional issue.

Since the Department of Defense is by statute an "Executive Department," this authority applies to the Secretary of Defense, as well as to the Secretaries of the Army, Navy, and Air Force.

More specifically, with respect to statutory provisions explicitly concerning authority to change defense organization, the current framework of defense organization law gives substantial authority to the President, the Secretary of Defense, and the Service Secretaries, to manage defense affairs. This authority includes:

- 10 U.S.C. § 121 provides "[t]he President may prescribe regulations to carry out his functions, powers, and duties under this title;
- 10 U.S.C. § 3061 provides "[t]he President may prescribe regulations for the government of the Army";
- 10 U.S.C. § 8061 provides "[t]he President may prescribe regulations for the government of the Air Force";
- 50 U.S.C. § 401 provides for a Department of Defense "under the direction, authority, and control of the Secretary of Defense," and that the Military Departments will operate "under the direction, authority, and control of the Secretary of Defense," and vests "overall direction and control [of research and engineering] in the Secretary of Defense";
- 10 U.S.C. § 133 makes the Secretary of Defense "the head of the Department of Defense" and gives him "authority, direction, and control over the Department of Defense" subject only "to the direction of the President and to this title [10 U.S.C.] and section 2 of the National Security Act of of 1947 [50 U.S.C. § 401]";
- 10 U.S.C. § 133(d) also gives the Secretary of Defense substantial power to delegate functions or duties. It provides: "[u]nless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate";
- 10 U.S.C. § 134 gives the Secretary authority to prescribe duties and powers for the Deputy Secretary of Defense;
- 10 U.S.C. § 135 gives the Secretary authority to prescribe certain duties and powers for the Under Secretaries of Defense;
- 10 U.S.C. § 136 gives the Secretary authority to prescribe duties and powers for the eleven Assistant Secretaries of Defense;
- 10 U.S.C. § 125 gives the Secretary certain powers to transfer functions and to assign development and operational use of new weapons or weapons system (this provision is subject in part to a *Chadha* problem);
- 10 U.S.C. § 141 makes the enumerated duties of the Joint Chiefs of Staff "[s]ubject to the authority and direction of the President and the Secretary of Defense";

- 10 U.S.C. § 142 makes certain enumerated duties of the Chairman of the Joint Chiefs of Staff "subject to the authority and direction of the President and the Secretary of Defense";
- 10 U.S.C. § 143 requires the approval of the Secretary of Defense for the selection of a Director of the Joint Staff;
- 10 U.S.C. § 646 gives the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs, an obligation to ensure that personnel policies give appropriate consideration to performance on the Joint Staff;
- 10 U.S.C. §§ 3012, 5031 and 8012 give the Secretary of Defense substantial authority to control the Service Secretaries and the Service Secretaries authority to prescribe regulations for their Departments;
- 10 U.S.C. §§ 3034, 5081 and 5082, 5201 and 8034 give the Service Secretaries substantial authority over the Chiefs of Staff;
- 10 U.S.C. §§ 3010, 5011 and 8010 provide that the Military Departments operate "under the authority, direction, and control of the Secretary of Defense";
- 10 U.S.C. § 5013 provides that the Marine Corps "shall perform such other duties as the President may direct";
- 10 U.S.C. § 124 provides that with the advice and assistance of the Joint Chiefs "the President through the Secretary of Defense" shall establish operational commands for specific missions and prescribe their force structure; and
- 10 U.S.C. § 171 gives the Secretary of Defense power of decision over the Armed Forces Policy Council and the power to direct it to consider and report on specific matters.

Lesser regulatory action, such as that of the Joint Chiefs in promulgating JCS Publication 2 on Joint Action Forces, would seem to be rooted in delegation of authority from the President or the Secretary or any statutory powers of the Office promulgating the regulation.

V

GENERAL DISCUSSION OF THE CONSTITUTIONAL DIVISION OF NATIONAL SECURITY POWERS BETWEEN CONGRESS AND THE PRESIDENT

In seeking to determine the intentions of the Founding Fathers with respect to the division of powers of relevance to this study between Congress and the President, it is essential to keep in mind that the control of foreign and miltary affairs were viewed quite differently from most constitutional powers. The men who met in Philadelphia in 1787 were generally disillusioned with the experience under the Articles of Confederation,[1] and decided to establish a government of separate, co-equal, and independent branches.

As Louis Fisher, of the Library of Congress' Congressional Research Service, wrote last year in *Constitutional Conflicts Between Congress and the President:*

> If [the Framers] wanted weak government, if they wanted it shackled and ineffective, they could have retained the Articles of Confederation. They decided against this, with very good reason. The framers had labored under a weak government from 1774 to 1787, and deliberately rejected that model in favor of stronger central powers. Consciously, at the national level, they vested greater powers in an executive.
>
> The distrust of executive power in 1776--against the king of England and the royal governors--was tempered by two developments in the following decade. Americans discovered that state legislative bodies could be as oppressive and capricious toward individual rights as executive bodies. Also, many delegates to the Continental Congress watched with growing apprehension as the Congress found itself incapable of discharging its duties and responsibilities. Support began to grow for an independent executive, in large part for the purpose of ensuring efficiency.[2]

A. The Theories of Locke, Montesquieu, and Blackstone

Prevailing theory, as well as practice, argued for the separation of constitutional powers into three independent branches--and also for the vesting of responsibility for the conduct of war and foreign affairs in the Executive. Particularly influential on this subject were the writings of Locke,[3] Montesquieu,[4] and Blackstone,[5] whose works were dubbed "the political Bibles of the constitutional fathers" by the late Professor Quincy Wright.[6] All three writers viewed the control of war and foreign affairs as a function of the Executive.

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[1] Article I of the Articles of Confederation, which entered into effect on 1 March 1781, vested in Congress "the sole and exclusive right and power of determining on peace and war . . . ."

[2] L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 12 (1985). For an example of the fear expressed by the Founding Fathers about "[t]he propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments," see THE FEDERALIST No. 73 at 494-95 (J. Cooke ed. 1961)(A. Hamilton).

Their reasoning was not that these critical functions were *executive* in the sense that they involved "executing" laws, but rather that the characteristics that were necessary to successfully exercise these powers closely paralleled those possessed by the Executive. In contrast, the very nature of Legislative bodies made them unfit to conduct war effectively or to control foreign affairs in general. Locke argued that in addition to the *Legislative* power of making laws,[7] and the *Executive* power of executing the laws,[8] there was "another *Power* in every Commonwealth" concerning relations between the society and "the rest of Mankind."[9] He explained:

> This therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called *Federative*, if any one pleases. . . .
>
> These two Powers, *Executive* and *Federative*, thought they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without* , with all those that it may receive benefit or damage from, yet they are always almost united. And though this *federative Power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. For the *Laws* that concern Subjects one amongst another, being to direct their actions, may well enough *precede* them. But what is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be *left* in great part to the *Prudence* of those who

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[3] TWO TREATISES ON CIVIL GOVERNMENT (1690).

[4] SPIRIT OF THE LAWS (1748).

[5] COMMENTARIES ON THE LAWS OF ENGLAND (1769).

[6] THE CONTROL OF AMERICAN FOREIGN RELATIONS 363 (1922). Professor Abraham Sofaer (now Legal Adviser to the Department of State) wrote in his excellent 1976 study, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER, that "Locke, Montesquieu, and Blackstone . . . were warmly received and ardently quoted, especially their doctrines of separation and mixing of powers. Colonialists embraced rather than rejected these English constitutional traditions; their complaint was that Britain failed to abide by the principles in dealing with the colonies.(At 17.) For a good discussion of the philosophies of Locke, Montesquieu, and Blackstone, see Thurow, *Presidential Discretion in Foreign Affairs,* 7 VAND. J. TRANS. L. 71 (1973).

[7] J. LOCKE, SECOND TREATISE OF GOVERNMENT §143.

[8] *Id.* §144.

[9] *Id.* §145.

> have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.
>
> Though, as I said, the *Executive* and *Federative Power* of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the Society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands . . . .[10]

Although using different terms,[11] Montesquieu--called by James Madison "[t]he oracle who is always consulted and cited"[12] on the subject of separation of powers--also placed control over the army in Executive hands: "When once an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing, its business consisting more in action than in deliberation."[13] Similarly, Blackstone entrusted military matters to the hands of the Executive. Professor Arthur Bestor explains:

> At the outset, Blackstone recognizes two different sources for the authority of the chief executive in the domain of foreign relations. Vis-a-vis other nations, the King "is the delegate or representative of his people." Therefore, the handling of all aspects of the "national intercourse with foreign nations" is an executive prerogative. The King is also "the generalissimo, or the first in military command, within the kingdom," and this fact places in executive hands the control of a variety of matters relating to military security. In similar fashion, the American Constitution designates the chief executive as the representative of the nation in its dealings with other nations and makes the President the commander in chief of the armed forces.[14]

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[10] *Id.* §§146-148.

[11] "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." 1 MONTESQUIEU, THE SPIRIT OF LAWS 151 (T. Nugent trans., rev. ed. 1900).

[12] THE FEDERALIST No. 47 at 324 (J. Cooke ed. 1961)(J. Madison).

[13] 1 MONTESQUIEU, THE SPIRIT OF LAWS 151.

[14] Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 4 SEATON HALL L. REV. 527, 532-33 (1974). Professor William Goldsmith, in volume 1 of his exhaustive study THE GROWTH OF PRESIDENTIAL POWER (1974), writes: "Some of the language and substantive provisions which are found in the *Commentaries* can be recognized in our constitution. . . . [T]here are a number of provisions in Article II which appear to be heavily influenced by Blackstone's chapter on the King's prerogative. The *Commentaries* present a Monarch who possesses close to absolute power in the realm of foreign policy as well as Commander in Chief of the Armed Forces . . . . Despite the Founding Fathers' denunciation of the unchecked power of the King and their undisguised contempt for most of the trappings of royalty, they were obviously greatly influenced by Blackstone's definition of executive powers, and gave their democratic monarch many of the same responsibilities." *Id.* at 56. But see *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850), cautioning against drawing similiarities between the powers of the British King and those of the American President.

B. The Constitutional Grants of Powers

The Constitution that emerged from the Philadelphia convention created three separate,[15] co-equal,[16] and independent[17] branches. To fully understand the intentions of its framers, it is useful to examine the specific grants to the two political branches of powers which might have relevance to the organization of the defense structure.

1. Powers of the President

(a) the "executive" power

Although it is popular to quote Professor Corwin's maxim that "the Constitution, considered only for its affirmative grants of power capable of affecting the issues, is an invitation to struggle for the privilege of directing American foreign policy,"[18] an understanding of the context of the document suggests less ambiguity.

Article two, Section one, of the Constitution provides that: "The executive power shall be vested in a President of the United States of America." Professor Quincy Wright informs us that "[w]hen the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant . . . ."[19] Professor Louis Henkin, writing in *Foreign Affairs and the Constitution,* adds: "The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[20]

This view is consistent with the thinking of the time. Thus, in 1790 Thomas Jefferson wrote: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly . . . ."[21] Three years later, in his first *Pacificus* letter, Jefferson's rival Alexander Hamilton argued in support of Washington's neutrality proclamation:

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[15] See, e.g., *Kendall v. United States,* 37 U.S. (12 Pet.) 524, 610 (1838)("The theory of the Constitution undoubtedly is that the great powers of the government are divided into separate departments . . . ."); *O'Donoghue v. United States*, 289 U.S. 516, 530-31 (1933); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); THE FEDERALIST No. 47 at 323 (J. Cooke ed. 1961)(J. Madison).

[16] *Dodge v. Woolsey,* 59 U.S. (18 How.) 331, 347 (1856); *Evans v. Gore*, 253 U.S. 247, 249 (1920) THE FEDERALIST No. 49 at 339 (J. Cooke ed. 1961)(J. Madison).

[17] See, e.g., *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838)("[S]o far as these powers are derived from the Constitution, the departments may be regarded as independent of each other.") *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 347 (1856); *Evans v. Gore*, 253 U.S. 245, 249)(1920);

[18] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th rev. ed. 1957).

[19] Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).

[20] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972).

[21] 3 THE WRITINGS OF THOMAS JEFFERSON 15 (A. Lipscomb & A. Bergh, eds. 1904).

> It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.[22]

While Hamilton's claim of broad executive powers was challenged by Madison (writing as *Helvidicus*),[23] there appears to be a consensus among scholars that Hamilton's interpretation prevailed.[24]

Two-thirds of the members of the First Congress had served either in the federal constitutional convention or in state ratification conventions,[25] and thus their attitudes towards separation of powers are worthy of special attention.[26] Particularly enlightening in understanding their concept of the separation of powers are the bills establishing the executive departments of Foreign Affairs [State],[27] War,[28] and the Treasury.[29] The Secretary of the Treasury was expressly required "to make reports, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office . . . ."[30] In contrast, both the Secretary of Foreign Affairs and the Secretary of War were to "perform and execute such duties as shall be entrusted to [them] by the President," and were to "conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."[31] Professor Willoughby explains:

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[22] Reprinted in 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 398 (1974). For an indication that Jefferson shared this view that the power to "declare war" was by its nature Executive, see *infra* note 170.

[23] It assessing the Madison-Hamilton dispute, it is perhaps worth noting that the final language of the Constitution was far more in keeping with Hamilton's proposal than with that of Madison. The "Virginia Plan" presented to the convention on 29 May 1787 by Edmund Randolph on the basis of a Madison draft included an executive elected by and clearly subordinate to the legislature. See, e.g., A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 26 (1976). In contrast, on 18 June Hamilton proposed an independent president with a veto over legislation (subject to being overridden by a two-thirds majority of each house), and the power to make treaties and appoint subordinates (both subject to the advice and consent of the Senate). Hamilton proposed that the president "shall be the commander in chief of the army and Navy of the United States and the Militia within the several States, and shall have the direction of war when commenced . . . ." 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 99 (1974).

[24] Professor Quincy Wright says: "Hamilton, who supported the executive character of the [Neutrality] proclamation, won, if future practice is to be the judge." (Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 136 (1922). Professor Goldsmith writes that "Hamilton's theory . . . has obviously been the theory and practice which has prevailed in the country, particularly in the modern period." 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 404 (1974). See also Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1777 (1968)("By and large it is Hamilton's view which has prevailed.")

[25] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 61 (1976).

[26] Chief Justice Marshall, in *Cohens v. Virginia* (19 U.S. [6 Wheat.] 264, 418 [1821]) observed that in trying to determine the intentions of the Founding Fathers, "[g]reat weight has always been attached, and very rightly attached, to contemporaneous exposition." While consistent legislative precedents over a lengthy period of time "ought not to be lightly disregarded" (*McCullouch v. Maryland* , 17 U.S. (4 Wheat.) 316 (1819)), in the final analysis "the Constitution does not consist primarily of precedents but of principles with which precedents, to be valid, must be squared." E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 139 (1976).

[27] 1 Stat. 28 (1789).

[28] 1 Stat. 49 (1798).

[29] 1 Stat. 66 (1789).

> The acts of Congress establishing the Department of Foreign Affairs (State) and of War, did indeed recognize in the President a general power of control, but the very first of those departments, it is to be observed, is concerned chiefly with political matters, and the second has to deal with the *armed forces which by the Constitution are expressly placed under the control of the President as Commander-in-Chief*. The act establishing the Treasury Department simply provided that the Secretary should perform those duties which he should be directed to perform, and the language of the act, as well as the debates in Congress at the time of its enactment, show that it was intended that this direction should come from Congress. Furthermore, the secretary is to make his annual reports not to the President, but to Congress. [Emphasis added.][32]

Professor Corwin notes that for the same reasons, the Post Office and Interior Departments were under close legislative scrutiny, while the Navy Department was placed under the executive.[33]

Equally enlightening as to the understanding of the First Congress with respect to the President's authority in the national security field was the appropriations act of 1 July 1790, which established a diplomatic contingent account. Although the Constitution expressly requires that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,"[34] the statute permitted the

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[30] *Id.*

[31] 1 Stat. at 28-29 (Foreign Affairs); 1 Stat. 49 (War).

[32] W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 620 (2d ed. 1934).

[33] Corwin writes: "The State and War departments are principally, although not exclusively, organs of the President in the exercise of functions which are assigned him by the Constitution, while the Treasury Department is primarily an instrument for carrying into effect Congress' constitutional powers in the field of finance. For like reason, when in 1794, the Post Office Department was established, it was not placed under the control of the President, nor was the Interior Department when it was formed in 1849; but the Navy Department, established in 1798, was so placed." E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 88 (1976). See also, E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 96 (1984).

[34] U.S. CONST. art. I, sec. 9.

President to conceal even from Congress the specific nature of sensitive expenditures.[35] It provided in part:

> [T]he President shall account specifically for all such expenditures of the said money *as in his judgment may be made public*, and also for the *amount* of such expenditures *as he may think it advisable not to specify*, and cause a regular statement and account thereof to be laid before Congress annually . . . . [Emphasis added.][36]

Legislative deference to the President in the control of foreign affairs was reaffirmed shortly after the Senate established its first Committee on Foreign Relations in 1816. In one of its first reports, the committee concluded: "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations . . . . For his conduct he is responsible to the Constitution."[37]

(b) The Commander-in-Chief Power

In addition to being given the "executive" power, the President was expressly named Commander-in-Chief of the army and navy.[38] Since the proceedings of the Constitutional Convention were held in secret, and the records which have become public are at best sketchy,[39] it is difficult to establish with much precision the intended scope of this power. Indeed, the absence of any record of discussion within the convention of this clause has led some scholars to conclude that it was adopted without debate.[40]

However, it is clear that the convention delegates were cognizant of their own recent history, and there was widespread dissatisfaction with excessive legislative power both under the Articles of Confederation and in most of the early state constitutions.[41] Clarence Berdahl observes: "The members of the Convention probably had not forgotten the trouble and embarrassment caused during the Revolution by congressional interference and the lack of a centralized control over the army.[42] Similarly, with an obvious reference to this experience, John Jay--seeking to justify the decision to grant the President exclusive control over international negotiations and intelligence matters--wrote in *Federalist* No. 64:

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[35] It is perhaps worth noting that the statute did not provided that the President could provide an accounting under an injunction of secrecy; which would have given Congress greater knowledge (and thus potential control) over expenditures while, in theory, keeping sensitive information from falling into the hands of foreign interests. This approach was probably not considered because it was widely recognized (from past experience) that Congress was not particularly good at safeguarding secrets.

[36] 1 Stat. 129 (1790).

[37] Quoted in *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 319 (1936).

[38] U.S. CONST. Art. II, sec. 2: "The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . . ."

[39] See, e.g., 1-4 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1937).

[40] See, e.g., C. WARREN, THE MAKING OF THE CONSTITUTION 530 (1937). Even without a verbatim record of the proceedings, a few conclusions may be drawn from the fact that several proposals to limit the Commander-in-Chief power were not included in the final version--such as the prohibition against the President personally taking "command" of the army in the field without the consent of the Senate or Congress. See C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 119 n.22 (1921). Additional insight into the meaning of the clause can be found in statements by members of the federal convention during subsequent ratification debates in state conventions (discussed *infra*).

> They who wish to commit the power under consideration [the power to make treaties] to a popular assembly, composed of members constantly coming and going in quick succession, *seem not to recollect that such a body must necessarily be inadequate* to the attainment of those great objects . . . .
>
> They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. *So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.* [Emphasis added.][43]

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[41] The anti-executive feels prevalent in 1776 led seven of the eight states adopting constitutions between 1776 and 1778 to include governors who were elected by the legislature and subject to its control. This "elective despotism"--to use Jefferson's word--proved to be a failure. When New York in 1777 adopted a constitution drafted by John Jay, Robert Livingston, and Gouverneur Morris (all of whom later played key roles in the federal convention), it was "widely regarded as the best of the new state constitutions," and led to reforms in several other states. 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 16 (1974). See also, A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 17-19 (1976). The similarities between the New York Constitution of 1777 and the federal Constitution of 1787 were dramatic. For example, the New York Constitution called for a popularly elected executive (art. XVII), bills of the bicameral legislature were subject to executive veto (which was then subject to override by 2/3 votes of each chamber)(art. III), the governor was made "commander in chief" (art. XVIII), given a pardon power (art. XVII), and given control over external relations (art. XIX).

[42] C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 115 (1921). He continues: "As students of political theory they were also undoubtedly impressed with the notion that the inherent nature of the executive office made it the proper repository for the chief command of the military and naval forces." (*Id.*)

[43] THE FEDERALIST No. 64 at 433-35 (J. Cooke ed. 1961)(J. Jay).

The *Federalist Papers* were written by Madison, Hamilton, and Jay during the fall and winter of 1787-88 in an effort to promote approval of the proposed Constitution by state ratifying conventions. As Chief Justice Marshall observed: "The opinion of the *Federalist* has always been considered as a great authority. . . . Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.[44] Hamilton, who had in the early days of the convention proposed that the president be "commander in chief of the army and Navy of the United States and the Militia within the several States, and . . . have the direction of war when commenced"[45]--language very close to that eventually adopted--assured his readers that the America president would have far less control over matters of war than did the British king. Writing in *Federalist* No. 69, which was originally published in the *New-York Packet* on 14 March 1788, Hamilton explained:

> [T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.[46]

The following day, in arguing for a strong and singular[47] Executive, Hamilton said in *Federalist* No. 70:

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . .
>
> That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, that the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.
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> This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by

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[44] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 246, 418 (1821). Jefferson wrote that the *Federalist* was "in my opinion, the best commentary on the principles of government, which ever was written." 7 THE WRITINGS OF THOMAS JEFFERSON 183 (A. Lipscomb & A. Bergh eds. 1903).

[45] 1 W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 99 (1974).

[46] THE FEDERALIST No. 69 at 465 (J. Cooke ed. 1961)(A. Hamilton).

[47] Several of the early plans considered at the convention would have permitted the executive power to be vested in a group of individuals, or in a President requiring the concurrence of a council.

> vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him.[48]

Hamilton believed that collective decision-making was a strength of legislatures, but a hinderance in the executive:

> In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check exesses in the majority. . . . But no favourable circumstances palliate or atone for the disadvantages of dissention in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure, to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the executive, which are the most necessary ingredients in its composition, vigour and expedition, and this without any counterballancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.[49]

Finally, he argued that plurality in the Executive was undesirable because it reduced accountability:

> [O]ne of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.
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> "I was overruled by my council. The council were so divided in their opinions, that it was impossible to obtain any better resolution on the

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[48] THE FEDERALIST No. 70 at 471-73 (J. Cooke ed. 1961)(A. Hamilton).

[49] *Id.* at 475-76.

point." These and similar pretexts are constantly at hand, whether true or false.[50]

Of special interest to an examination of separation of powers vis-a-vis defense organization, is Hamilton's discussion of the "executive" function of "administering" the government in *Federalist* No. 72:

> The administration of government . . . in its most usual and perhaps in its most precise signification . . . is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, ***the arrangement of the army and navy, the direction of the operations of war***, these and other matters of a like nature constitute what seems to be most properly understood by the administration of government. [Emphasis added.][51]

In *Federalist* No. 74, Hamilton again examined the President's power as Commander-in-Chief:

> The President of the United States is to be "Commander in Chief of the army and navy of the United States, and of the militia of the several States *when called into the actual service* of the United States." The propriety of this provision is so evident in itself; and it is at the same time so consonate to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the Chief Magistrate with a Council, have for the most part concentrated the military authority in him alone. ***Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.*** The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part of the definition of the executive authority. [Bold italics added.][52]

During the state ratification conventions, some concern was expressed about transferring the power to command the army from Congress--where it had been under the Articles of Confederation--to the President[53]; but on the whole the power was not seriously questioned.[54] In the North Carolina convention, for example, James Iredell reasoned: "In almost every country, the executive has the command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations, can only be expected from one person."[55]

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[50] *Id.* at 476-77.

[51] *Id.* No. 72 at 486-87.

[52] *Id.* No. 74 at 500. This essay appeared in the *New York Packet*, on 25 March 1788.

[53] See, e.g., statement by Mr. Miller in the North Carolina convention, 4 ELLIOT'S DEBATES 114, quoted in C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 116 (1921).

Although not universally admitted,[56] the majority and better reasoned view is that President's Commander-in-Chief power is beyond the reach of Congress. As the Supreme Court said in *Hamilton v. Dillin,* "the President alone . . . is constitutionally invested with the entire charge of hostile operations . . . ."[57] He *commands* the military force--deciding when and where they are deployed[58] (inside or outside the United States[59]) and what actions they are to take in order to deter or defeat an enemy.[60] That command can neither be exercised by Congress nor vested by statute in any other individual or group.[61] It is one of those "important political powers" which Chief Justice Marshall observed in *Marbury v. Madison* are vested by the Constitution in the President, and "in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." Marshall explained that these powers "respect the nation, not individual rights, and being intrusted to the executive, the decison of the executive is conclusive . . . . *[T]here exists, and can exist, no power to control that discretion.*" [Emphasis added.][62]

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[54] *Id.*

[55] 4 ELLIOTTS' DEBATES at 107-08, quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 49 (1976). Sofaer adds: "Several statements [in state ratification debates] also indicate that the President was to act independently in conducting military operations, to insure effectiveness." *Id.* at 58.

[56] Berdahl writes:"Although there has been some contention that Congress, by virtue of its power to declare war and to provide for the support of the armed forces, is a superior body, and that the President, as Commander-in-Chief, is 'but the Executive arm, . . . in every detail and particular, subject to the commands of the lawmaking power' [quoting Senator Bacon], practically all authorities agree that the President, as Commander-in-Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments." C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 116-17 (1921). See also Professor Louis Henkin's statement: "As Commander-in-Chief in war declared by Congress, the President has exercised full and exclusive control of the conduct of war (though how much he could do without authorization from Congress is uncertain and largely academic since he has usually had broad delegations in advance, or ratifications soon after.)" L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 51-52 (1972).

[57] 88 U.S. 73, 87 (1875). The President is also empowered by the Constitution to use the armed forces even in peacetime to protect American citizens abroad, however this authority may stem more from the "privileges and immunities" and "take care that the laws be faithfully executed" clauses than from his "commander in chief" power. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872); *Durand v. Hollins*, 8 F. Cas. (4 Blatch.) 451, 454 No. 4186 (C.C.S.D.N.Y.1860); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 305-06 (1922); L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 294-95 (1985).

This is not to suggest that Congress is powerless to influence the command of the military forces. An excellent discussion of the categories of executive power under the Constitution was provided a century ago by Professor John Norton Pomeroy, in his *Introduction to the Constitutional Law of the United States*. He divided the President's powers into three groups: (1) Those that are vested exclusively in the President and are entirely beyond the reach of Congress (the most important of which is the management of negotiations and foreign affairs); (2) Those which are uncontrollable by Congress but which require some prior act of Congress before they can be exercised (such as the Commander-in-Chief, pardoning, and appointment powers); and (3) Those functions "which depend upon some prior laws of Congress not only for the opportunities and occasions of their exercise, but for their number, character, and scope." This third class "embraces by far the greater part of the Congressional legislation, and of the executive functions based thereon."[63] Discusing the second class of powers, Pomeroy writes:

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[58] See, e.g., W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 94 (1916)("The President is the Commander-in-Chief of the army and navy, and the militia when called into the service of the United States. Under this, he can order the army and navy anywhere he will, if the appropriations furnish the means of transportation." Berdahl writes: "As a matter of fact, there never has been any serious doubt as to the President's constitutional power to order the regular army wherever he may think best in the conduct of a war, whether within or without the limits of the United States." C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 121 (1921). Professor Wright adds: "The Court held in *Martin v. Mott* that the President could determine when the exigency existed for calling forth the militia as specified by Congess, and no power could review his action. It seems equally certain that he can determine when a proper constitutional occasion for using the army has occurred and is not limited by congressional expressions in this regard." Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 193 (1922). See also, J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 569 (1886) and A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 147-53 (1976).

[59] See, e.g., 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1567 (2d ed. 1929)("There has been no question as to the constitutional power of the President of the United States, in time of war, to send troops outside of the United States when the military exigencies of the war so require. This he can do as commander-in-chief of the Army and Navy, and his discretion in this respect can probably not be controlled or limited by Congress. As to his constitutional power to send United States forces outside the country in time of peace when this is deemed by him necessary or expedient as a means of preserving or advancing the foreign interests or relations of the United States, there would seem to be equally little doubt.").

[60] Berdahl states: "Just as the President decides when and where troops shall be employed in time of war, so he alone likewise determines how the forces shall be used, for what purposes, the manner and extent of their participation in campaigns, and the time of their withdrawal." C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 122 (1921).

[61] This point will be discussed at greater length in chapter VI.

[62] *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165 (1803). Since the language of the statutes establishing the departments of War and Foreign Affairs were largely identical, it is worth noting that the Chief Justice was referring specifically to the President's powers under the Foreign Affairs statute. Corwin points out that these powers were "entirely in the 'political field,' and hence for their discharge the secretary was left responsible absolutely to the President." E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 88 (1976).

> The constitutional grants of power are affirmative and express; but they relate to such a class of acts, that Congress must furnish the subject-matter upon which the power may be exerted. But even here, the legislature has exhausted its authority when it has furnished the occasion or opportunity. The executive attributes having been brought into play, the discretion of the President is as absolute and unlimited as in the cases embraced within the former class. . . .[64]

(c) the national security "executive privilege"

Another recognized power of the President in the national security field is the right to refuse to provide certain types of sensitive information to Congress (or any other party). The existence of this power is firmly established by nearly two centuries of constitutional practice. Were no such privilege to be recognized, and Congress as a matter of right given access to the most sensitive diplomatic and military secrets, the intention of the Founding Fathers to grant control of such matters to the Executive rather than the Congress--in part in order to preserve "secrecy"--would be defeated.[65]

There is some evidence that the decision to add the phrase "from time to time" to Article II, Section 3--providing that the President "shall from time to time give to the Congress information on the state of the Union"--was inserted to permit the President to conceal sensitive expenditures from the Congress until the need for secrecy had disappeared. This was the explanation of George Mason during the Virginia ratification convention.[66]

The right of the President to deny sensitive national security information to Congress was established by early practice--beginning with President Washington, whose entire cabinet (including Jefferson and Hamilton) concurred that such power existed[67]--and has been affirmed in the writings of prominent constitutional scholars and in Attorney

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[63] J. POMEROY, INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §§635-38 (1868).

[64] *Id.* §637.

[65] See general THE FEDERALIST (J. Cooke, ed. 1961)(esp. No. 64); and A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER (1976)(esp. pp. 35, 55).

[66] See, e.g., Note, *The CIA's Secret Funding and the Constitution*, 84 YALE L. J. 608, 622 (1975).

[67] See Winters, *The Seedlings for the Forest*, 83 YALE L. J. 1733 (1974); and A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 128 (1976).

General[68] and Supreme Court opinions. Professor Sofaer, in his landmark work, *War, Foreign Affairs, and Constitutional Power*, gives many examples to illustrate congressional recognition of an executive privilege to withhold sensitive information. For example, on 6 April 1796, during the dispute concerning the request by the House of Representatives for information about the Jay Treaty, Congressman James Madison argued that although "the House must have a right, in all cases, to ask for information which might assist their deliberations on the subjects submitted to them by the Constitution,"[69] the President "had a right, under a due responsibility, also to withhold information, when of a nature that did not permit a disclosure of it at the time."[70] The special status of national security information was recognized in a practice developed during the Washington administration[71] of qualifying congressional requests for such material to recognize executive discretion. As the Supreme Court noted in *United States v. Curtiss-Wright Export Corp.*:

> The marked difference between foreign affairs and domestic affairs . . . is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.[72]

The Court's failure to include the Department of War on the "foreign affairs" side of the equation was almost certainly an oversight. In discussing the need for government secrecy, it was common for the Founding Fathers to observe that "military operations and foreign negotiations" both required "secrecy."[73] Indeed, the controversy that led Washington's cabinet to first address the question of an "executive privilege" to withhold information from Congress involved a House request directed to Secretary of War Knox seeking documents related to the military defeat of General St. Clair.[74] It was as a direct result of this dispute that the practice of addressing such requests to the President (rather than the Secretaries of War or State) began.[75] Professor Sofaer discusses the Cabinet meeting of 2 April 1792, and its consequences:

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[68] See, e.g., 41 Op. Att'y Gen. 514-21 (1963) ("The congressional power of investigation is, of course, broad. Nevertheless it has limitations, one of which is based upon the doctrine of separation of powers inherent in our Constitution. . . . In my opinion, Congress could not under the Constitution directly require the President to furnish information about a department or agency in the executive branch, if he determined that the disclosure of such information was imprudent or incompatible with the public interest; and it seems equally plain the Congress may not use its power over appropriations to attain indirectly an object which it could not have accomplished directly.").

[69] Note that even this claim is limited to "subjects submitted to them by the Constitution," and thus the President's power to withhold (recognized by Madison in the following clause) was in Madison's view apparently not limited to matters vested exclusively in the President by the Constitution.

[70] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 92 (1976). See also, *id.* at 88.

[71] *Id.* at 80-81.

[72] 299 U.S. 304, 321 (1936).

[73] See, e.g., James Iredell's statement in the North Carolina ratification convention (quoted *supra*) that "[t]he secrecy, dispatch, and decision, which are necessary in military operations, can only be expected from one person." Quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 49 (1976). George Mason noted in the Virginia convention that "in matters relative to military operations and foreign negotiations, secrecy was necessary sometimes . . . ." *Id.* at 53.

> Jefferson reported that all agreed "that the House was an inquest, and therefore might institute inquiries. . . , [and] that it might call for papers generally." They concluded, however, "that the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were [sic] to exercise a discretion." They also agreed that the request should have been directed not to Secretary Knox but to the President, who controlled all department heads and papers, and undertook "to speak separately to the members of the committee and bring them by persuasion to the right channel." . . .
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> [T]here are indications that the Cabinet's decisions were communicated to members of the House. On April 4, following the Cabinet meeting of April 2, the House addressed a formal request to the President that he "cause the proper officers to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair." Not only did the House shift to addressing the President directly, as the Cabinet felt it should, but it also requested only those papers "of a public nature." The latter phrase is somewhat ambiguous, since it may mean those papers that could properly or safely be made public, or that the House desired all public documents, no matter how sensitive, but did not want the papers of private persons that happened to be in the government's control. The former construction seems far more reasonable, however, and would be consistent with Congress's frequent practice of authorizing discretionary withholding.[76]

The executive privilege to withhold sensitive information from Congress has been recognized by legal scholars over the years. Writing in *Our Chief Magistrate and His Powers*, Yale Law School Professor (and later Supreme Court Chief Justice) William Howard Taft stated that the requirement that the President from time to time to give to Congress information on the state of the Union "does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest."[77] In volume three of his classic treatise, *The Constitutional Law of the United States,* Professor Westel Willoughby concluded that "it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold."[78]

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[74] *Id.* at 81.

[75] *Id.* at 82.

[76] *Id.* at 81-83. This practice was continued during subsequent administrations. See, e.g., *Id.* at 177, 235.

These and other writings by prominent constitutional scholars are reinforced by decisions and *dicta* of the U.S. Supreme Court. For example, in *Barenblatt v. United States*, the Court stated: "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."[79] Although the Court has never been called upon to resolve a dispute between the President and the Congress involving a claim of an executive privilege to protect national security information (in large part, perhaps, because Congress has generally conceded the existence of such a power), there are *dicta* in important inter-branch cases which suggest the broad scope of such a claim. For example, although denying a claim of privilege in *United States v. Nixon* in 1974, the Court stressed that the case at bar did not involve "a claim of need to protect military, diplomatic, or sensitive national security secrets;"[80] that the case involved "nondiplomatic" matters;[81] and finally that the President did not "place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."[82] Commenting on this case three years later, the Court in *Nixon v. Administrator of General Services* summarized its earlier decision:

> The Court recognized that the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities, but distinguished a President's "broad, undifferentiated claim of public interest in the confidentiality of such [communications]" from the more particularized and less qualified privilege relating to the need "to protect military, diplomatic, or sensitive national security secrets. . . ." The Court held that in the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch.[83]

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[77] W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 129 (1916).

[78] W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1488 (2d ed. 1929).

[79] 360 U.S. 109 (1959).

[80] 418 U.S. 683, 706 (1974).

[81] *Id.* at 707.

[82] *Id.* at 710.

[83] 433 U.S. 425, 447 (1977).

(d) the appointment and removal power

Although perhaps not central to the work of the Blue Ribbon Commission, it may be useful to consider briefly the respective constitutional powers of Congress, the Senate, and the President in the appointment and removal of military officers. While on the one hand there may be significant policy reasons for wishing to have a certain amount of "job security" in professional military ranks,[84] in the final analysis it would seem important to the doctrines of separation of powers and civilian control of the military that the President have power to remove an officer who in the President's judgment has acted improperly,[85] or who for other reasons has lost the President's confidence.[86] Even were there no constitutional principles involved, the image of a Commander-in-Chief trying to conduct a war through a general he detested and distrusted is sufficiently alarming to mitigate against an organizational or statutory structure conducive to such a development.

Unfortunately, such a possibility is not totally theoretical. In the past Congress has by statute placed alarming limitations on the President's control of his military subordinates,[87] and even today the President is prohibited *by statute* from dismissing a military officer upon his own authority.[88] While this prohibition does not apply during time of war,[89] in an era of strategic missiles, nuclear weapons, and "come as you are" war, the effectiveness of such provisions in safeguarding the President's discretion as Commander-in-Chief may be illusory. While Congress and the Senate have important constitutional powers affecting the creation of military offices and the appointment of officers,[90] the Commission may wish to address briefly both the wisdom and the constitutionality of statutory constraints upon the President's power to dismiss military subordinates.[91]

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[84] Protecting officers, for example, from being dismissed or otherwise punished for failing to openly endorse the political views of an incumbent Commander-in-Chief.

[85] Consider, for example, the Truman-McArthur controversy during the Korean War.

[86] For example, consider the Lincoln-McClelland controversy during the Civil War. In FEDERALIST No. 70 (discussed *supra*) Hamilton stressed that one reason for establishing a singular Executive was to assure *accountability*. This important principle would be jeopardized if the President could assert that military failures resulted from having his "hands tied" by Congress through restrictions on his ability to rid himself of an incompetent general.

[87] Examples will be discussed *infra*.

[88] This statute will be discussed *infra*..

[89] Discussed *infra*.

[90] These will be discussed *infra*.

[91] The existing system of courts martial appears to be very effective in maintaining military discipline, and we do not mean to suggest that it should not continue to be the standard mechanism for dealing with incidents of incompetence, insubordination, criminal behavior, or the like. However, a court martial conviction requires the affirmative approval of military officers, and theoretically could be subject to abuse. While one would not expect such a power to be exercised except in highly unusual circumstances, the doctrine of civilian control of the military suggests the desirability of either the President or some subordinate civilian authority having ultimate dismissal power. As will be discussed *infra*, the doctrine of separation of powers mitigates both against this power being vested in the legislative branch and against it being denied by that branch to the President.

Article II, Section 2, of the Constitution provides in part that:

> The President . . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors . . . and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Both its placement in Article II, and the historical record, suggest that the appointment of both civil and military officers was viewed primarily as an executive function, and that the "advice and consent" role entrusted to the Senate was but a "check" to insure that no "unfit" person be appointed. Otherwise, the President's discretion was expected to prevail. Thus, Hamilton writes with respect to this clause in *Federalist* No. 76:

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretentions to them. . . .
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> In the act of nomination his judgement alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. . . .
>
> But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The persona ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. . . .
>
> To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent *check* upon a spirit of favoritism in the President, and would tend greatly *to preventing the appointment of unfit characters* from State prejudice, from family connection, from personal attachment, or from a view to popularity. [Emphasis added.][92]

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[92] THE FEDERALIST No. 76 at 509, 510-13 (J. Cooke ed. 1961)(A. Hamilton). Jefferson also argued that the Senate's "advice and consent" role concerning appointments amounted only to seeing "that no unfit person be employed." 3 THE WRITINGS OF THOMAS JEFFERSON 17 (A. Lipscomb & A. Bergh, eds. 1903).

Although, as the Supreme Court has observed, "[t]he history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals,"[93] it is equally clear that neither the text nor the accompanying debates established with certainty the location (if any) of the removal power. Indeed, in Federalist No. 77 Hamilton suggested that Senate consent "would be necessary to displace as well as to appoint,"[94] although he apparently later retracted that position.[95]

The issue of removal first received careful attention in 1789, when the First Congress debated the creation of the Department of Foreign Affairs. An extensive debate occurred over the power to remove the Secretary of Foreign Affairs from office, during which Representative James Madison argued:

> Several constructions have been put upon the Constitution relative to the point in question. The gentleman from Connecticut . . . has advanced a doctrine . . . that the power of displacing from office is subject to Legislative discretion; because it having a right to create, it may limit or modify as it thinks proper. . . . [W]hen I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive, and Judicial powers of the Government; and when I consider, that, if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give it to the Senate alone, or the President and Senate combined; they may rest it in the whole Congress, or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it. . . .
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> The doctrine . . . which seems to stand most in opposition to the principles I contend for, is, that the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment. I agree that if nothing more was said in the Constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be a great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution no less explicit than the one on which the gentleman's doctrine is founded; it is that part which declares that the Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular

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[93] *Id.* at 119.

[94] THE FEDERALIST No. 77 at 515 (J. Cooke ed. 1961)(A. Hamilton).

[95] E. CORWIN, THE PRESIDENT; OFFICE AND POWERS, 1787-1984 at 103 (1984).

> function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly. . . .
>
> There is another maxim which ought to direct us in espounding the Constitution, and it is of great importance. It is laid down, in most of the Constitutions or bills of rights in the republics of America; it is to be found in the political writings of the most celebrated civilians, and is every where held as essential to the preservation of liberty, that the three great departments of Government be kept separate and distinct; and if in any case they are blended, it is in order to admit a partial qualification, in order more effectually to guard against an entire consolidation. I think, therefore, when we review the several parts of this Constitution, when it says that the Legislative powers shall be vested in a Congress of the United States, under certain exceptions, we must suppose they were intended to be kept separate in all cases in which they are not blended, and ought, consequently, to expound the Constitution so as to blend them as little as possible.[96]

Madison was concerned that if Senate approval were necessary to dismiss the Secretary of Foreign Affairs, that officer might form an alliance with a group of Senators to undercut the President's policies, thus weakening the President and enhancing Legislative power--which he argued was "of such a nature that it scarcely can be restrained."[97] His prescience was remarkable.[98]

Madison's position that the dismissal power properly belonged to the Executive prevailed, and the power of the President to remove his cabinet secretaries was expressly recognized in the bills establishing the Departments of Foreign Affairs, War, and Treasury.[99] Although not specifically included in the legislation establishing the Department of War in 1798, the Supreme Court has concluded: "The change of phraseology, arose, probably, from its having become the settled and well-understood construction of the constitution, that the power of removal was vested in the president alone, in such cases; although the appointment of the officer was by the president and senate."[100] For many decades the issue was viewed--even by those who on principle disagreed with Madison's reasoning[101]--as resolved by the "Decision of 1789."[102]

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[96] 1 ANNALS OF CONG. 496-97 (1789).

[97] Quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 64 (1976).

[98] See the discussion of congressional alliance with Army officers against President Johnson during the Reconstruction period following the Civil War, in Section VI.

[99] 1 Stat.28, 49, 65.

Before turning to the statutory challenges to this principle which began in the 1860's, it is perhaps useful to consider whether there are constitutional differences between the President's relationship with "civil" and "military" officers such as might justify a different rule in their dismissal. When the issue was considered by Attorney General Hugh Legare in 1842, he noted the established principle from the Decision of 1789 and concluded the reasoning applied "*a multo fortiori*"[103] to "the military and naval departments."[104] The issue was again visited in 1847, when Attorney General Nathan Clifford wrote:

> The only question that remains to be considered, is the one relating to the power of the President to dismiss military or naval officers from the service without the sentence of a court-martial. It is very properly admitted in the argument that the question was distinctly settled by Congress in 1789 in favor of the power of the President, so far as it relates to the civil officers of the government. It is conceded that they are removable at pleasure in all cases under the constitution where the term of office is not specifically declared. . . .
>
> Much the largest class of civil officers are appointed under that clause of the constitution from which the power of the President is derived to appoint the officers of the army and navy. The same language which authorizes the President to appoint an officer of the customs also authorizes him to appoint a captain in the navy. Both are embraced in the following phrase: "And all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law."

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[100] *Ex parte Henner*, 38 U.S. (13 Pet.) 230, 258 (1839). For what it is worth, there is some question as to whether appointments are made (in the words of the Court) "by the president and senate." Although Jefferson argued that the Constitution gives the discretionary powers of *nomination* and *commissioning* to the President, and "the *appointments* to him and the Senate jointly" (3 THE WRITINGS OF THOMAS JEFFERSON 16 (A. Lipscomb & A. Bergh, eds. 1903); Chief Justice Marshall argued that the power of "appointment" was "also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 53, 54 (1803). This later interpretation was relied upon by the Attorney General in 1884 (18 Ops. Att'y Gen. 18, 26 (1884). Rather than quibble about semantics, the better view is probably that appointment to executive positions is an executive function, but is subject to a "veto" of unfit nominees by the Senate.

[101] See, e.g., Judge Story's statement: "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust." 3 STORY, COMMENTARY ON THE CONSTITUTION 379 (§1538), quoted in 4 Ops. Att'y Gen. 1, 2 (1842). See also 4 Ops. Att'y Gen. 603 (1847)("It is worthy of special remark, that several commentators on the constitution, who do not entirely admit the correctness of the construction adopted, are nevertheless constrained to regard the question as closed.").

[102] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1789-1984 at 98 (1984).

[103] "With much stronger reason."

[104] 4 Ops. Att'y Gen. 1, 2 (1842).

> It is difficult to appreciate the reasoning which seeks to affix a permanent tenure to military office, while it is admitted that all civil officers appointed under the same clause, with the exceptions specially provided for in the constitution, hold their places subject to the executive discretion. . . .
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> The form of a military commission in general use expressly describes the tenure of office, and very clearly recognises the doctrine of 1789: "This commission to continue in force during the pleasure of the President of the United States for the time being."[105]

Congress addressed the question of dismissing military officers during the Civil War, in an 1862 statute which seemed to confer power to dismiss on the President. It read in part:

> SEC. 17. *And be it further enacted*, That the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service either in the army, navy, marine corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service.[106]

Considering this provision in 1868, Attorney General Browning concluded that it "did not, in my opinion, clothe the President with a new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him."[107] Discussing the same statute a decade later, Attorney General Charles Devens concluded: "It is probable that the force of the act is to be found in the word 'requested,' by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis of the State."[108]

In the final days of the Civil War, the Congress went one step further, attempting to divest the President of his authority to dismiss military officers in the absence of a conviction by court martial. On 3 March 1865, a statute was enacted containing the following provision:

> SEC. 12. *And be it further enacted*, That in case any officer of the military or naval service who may be hereafter dismissed by authority of the President shall make an application in writing for a trial, setting forth under

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[105] 4 Ops. Att'y Gen. 603, 608-11 (1847). See also, 8 *id.* 223, 232 ("I am not able to perceive any satisfactory ground of distinction in this matter between civil and military officers of the Government. There is none in the letter of the Constitution."); 15 *Id.* 421-22 (1878)("The power to dismiss officers from the military service . . . was repeatedly and frequently exercised from the time of the adoption of the Constitution. . . . That the President had this power has not, as far as I know, been controverted by any adjudged case . . . . [I]n every instance where the question had arisen and been considered by the Attorney-General it had been held that the authority thus to dismiss was derived from the Constitution . . . .").

[106] 12 Stat. 596.

[107] 12 Ops. Att'y Gen. 421, 426 (1868).

[108] 15 *id.* at 422 (1878).

> oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void.[109]

In practical effect, this was an attempt by statute to take away from the President a power that for more than seventy-five years had been almost universally held to be granted exclusively to the President by the Constitution--or, perhaps more accurately, to give a *veto* over the President's exercise of that authority to a panel of active duty military officers (a court martial). It was an interesting development in the doctrine of civilian control of the military.

Following General Lee's surrender and the assassination of President Lincoln in April 1865, relations between Congress and the President deteriorated dramatically. President Johnson granted an amnesty to certain former southern sympathizers against the expressed wishes of Congress on 29 May, and further antagonized Congress by vetoing a bill to extend the Freedmen's Bureau the following February. When the FY 1867 military appropriations bill was enacted on 18 July 1866, it provided in part that "no officer in the military or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."[110] From the *Congressional Globe* it appears that the provision was inserted on the House floor without debate.[111]

Relations between the Republican-controlled Congress and President Johnson continued to deteriorate with the passage over presidential vetoes of the Basic Reconstruction Act and the Tenure of Office Act of 2 March 1867--which eventually led to the President's impeachment and trial. During the midst of this struggle, on 2 March 1867 Congress enacted--in the face of sharp objections by the President and some of its own members that the move was unconstitutional[112]--a bill prohibiting the President from moving the headquarters of the commanding general; and requiring that all "instructions relating to military operations" issued by the Secretary of War "be issued through the General of the army," who in turn could not be "removed, suspended, or relieved from command, or assigned to duty elsewhere than at such headquarters, except at his own request, without the previous approval of the Senate . . . ."[113]

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[109] 13 Stat. 489 (1865).

[110] 14 *Id.* 92 §5 (1866).

[111] 36 CONG. GLOBE 3254 (19 June 1866).

[112] 37 CONG. GLOBE 1851(26 Feb 1867). This legislation will be discussed in greater detail *infra*.

[113] 14 Stat. 486-87 (1867).

Not content with limiting the President's Commander-in-Chief power, in 1870 the Congress also went after his pardon power.[114] Just as its power "to make rules for the government and regulation of the land and naval forces"[115] had been used in an attempt to limit the Commander-in-Chief power, Congress sought to use its power to control the jurisdiction of the courts[116] to deny former southern sympathizers any judicial remedy to recover confiscated property following their pardon.[117] The statute was challenged before the Supreme Court, which promptly struck it down. While acknowledging that Congress had "complete control over the organization and existence" of the Court of Claims, and "may confer or withhold the right of appeal from its decisions," it could not use that power "to deny to pardons granted by the President the effect which this court has adjudged them to have . . . ."[118] The Court reasoned:

> It is the intention of the Constitution that each of the great coordinate departments of the government--the legislative, the executive, and the judicial--shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration.[119]

Since it did not infringe upon private rights, it is not surprising that the 1867 statute attempting to control the location of the Army headquarters, and requiring that orders be issued only through the commanding general, did not come before the Court before it was repealed following President Johnson's departure from office. However, the July 1866 appropriations rider prohibiting the President from dismissing officers without a court martial did come before the Court in 1880 in the case of *Blake v. United States*.[120] Unfortunately for our purposes, the Court was able to dispose of the case without reaching the constitutional issue, expressing "no opinion" over whether the Congress could limit the powers of the President and the Senate by statute.[121]

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[114] U.S. CONST. art. II, sec. 2, provides in part: "The President shall be commander in chief of the army and navy of the United States, . . . and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

[115] *Id.* art. I, sec. 8, cl. 14 (discussed *infra*).

[116] *Id.* art.III, sec. 1.

[117] 16 Stat. 235 (1870).

[118] *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1872).

[119] *Id.* at 147-48.

[120] 103 U.S. 227 (1880).

[121] *Id.* at 236-37. Rather than challenging the power of Congress to restrict the President's removal power, the case involved the power of the President and the Senate to "supersede" one officer by appointing another in his place--which the Court concluded was not prohibited by the provisions of the 1866 act. (Because of the "case" or "controversy" provision of art. III, the Supreme Court is prohibited from giving "advisory" opinions and will thus not (under normal circumstances) address a constitutional issue unless necessary to the resolution of the case before it.)

However, the authority of Congress to limit the President's constitutional power to remove an executive officer did receive very careful attention by the Court in the 1926 case of *Myers v. United States*.[122] In 1876 Congress had enacted a statute providing that the President must obtain the approval of the Senate before he could remove a Postmaster of the first, second, or third class. In a lengthy opinion delivered by Chief Justice Taft, the Court held the statute to be unconstitutional. The Court traced the history of the Decision of 1789 in great detail, and reasoned:

> "The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint. . . . A veto by the Senate--a part of the legislative branch of the Government--upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment. It is not to be implied."[123]

Turning specifically to the troubled decade during which most of these restrictions had been enacted, the Court provided some insightful background and judgments:

> "We come now to a period in the history of the Government when both Houses of Congress attempted to reverse this constitutional construction and to subject the power of removing executive officers appointed by the President and confirmed by the Senate to the control of the Senate--indeed, finally, to the assumed power in Congress to place the removal of such officers anywhere in the Government.
>
> This reversal grew out of the serious political difference between the two Houses of Congress and President Johnson. There was a two-thirds majority of the Republican party in control of each House of Congress, which resented what it feared would be Mr. Johnson's obstructive course in the enforcement of the reconstruction measures, in respect of the States whose people had lately been at war against the National Government. This led the two Houses to enact legislation to curtail the then acknowledged powers of the President. . . . The real challenge to the decison of 1789 was begun by the Act of July 13, 1866, . . . forbidding dismissals of Army and Navy officers in time of peace without a sentence by court-martial, which this Court, in *Blake v. United States*, . . . attributed to the growing differences between President Johnson and Congress.

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[122] 272 U.S. 52 (1926).

[123] *Id.* at 119, 121.

> Another measure having the same origin and purpose was a rider on an army appropriation act of March 2, 1867, . . .which fixed the headquarters of the General of the Army . . . at Washington . . . .
>
> But the chief legislation in support of the reconstruction policy of Congress was the Tenure of Office Act, of March 2, 1867, . . . providing that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appinted and qualified, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President by whom appointed and one month thereafter subject to removal by consent of the Senate. The Tenure of Office Act was vetoed, but it was passed over the veto. The House of Representatives preferred Articles of impeachment against President Johnson for refusal to comply with, and for conspiracy to defeat, the legislation above referred to, but he was acquitted for lack of a two-thirds vote for conviction in the Senate. . . .
>
> *The extreme provisions of all this legislation were a full justification for the considerations so strongly advanced by Mr. Madison and his associates in the First Congress for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies. It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government, if the President had no power of removal save by consent of the Senate. It was an attempt to re-distribute the powers and minimize those of the President.*
>
> After President Johnson's term ended, the injury and *invalidity* of the Tenure of Office Act in its radical innovation were immediately recognized by the Executive and objected to. [Emphasis added.][124]

Less than a decade after the *Myers* decision, its sweeping holding was modified by the Court in the case of *Humphrey's Executor v. United States.*[125] At issue was whether the *Myers* holding permitted the President to remove a Federal Trade Commissioner. In holding that the President lacked such power, the Court rejected some of the "sweeping dicta" of the *Myers* decision, drawing a distinction between purely "Executive" officers and those who are "predominantly quasi-judicial and quasi-legislative."[126] After examining the legislative history, the Court concluded: "The debates in both houses demonstrate that the prevailing view was that the [Federal Trade] commission was . . . to be 'separate and apart from any existing department of the government'--not subject to the orders of the

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[124] *Id.* at 164-67.

[125] 295 U.S. 602 (1935).

[126] *Id.* at 624.

President."[127] The position of Federal Trade Commissioner was contrasted with that of Postmaster[128] involved in the *Myers* case:

> The office of postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds no support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. Putting aside *dicta*, which may be followed if sufficiently persuasive but which are not controlling, ***the necessary reach of the [Myers] decision goes far enough to include all purely executive officers***. It goes no farther;--much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President. . . .
>
> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character just named.[129]

To further clarify the scope of its holding and the status of the *Myers* decision, the Court concluded:

> The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the officer; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.
>
> To the extent that, between the decision in the *Myers* case, which ***sustains the unrestrictable power of the President to remove purely executive officers***, and our present decision that such power does not extend

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[127] *Id.* at 625.

[128] It is perhaps worth noting that the case for presidential control over a Postmaster is far weaker than that for his control of his military subordinates. Congress has specific constitutional authority (art. I, sec. 8, cl. 7) "to establish post offices," and the duties of a Postmaster do not require the "speed, secrecy, or dispatch" which led the Founding Fathers (following the wisdom of Locke, Montesquieu, and others) to give the President extraordinary powers in matters of national security.

[129] *Id.* at 624-25, 627-29.

> to an office such as that here involved [Federal Trade Commissioner], there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise. [Emphasis added.][130]

Despite this relatively clear holding, the statutory prohibition denying the President the right to dismiss a military officer during peacetime except pursuant to a decision of a court martial, or in commutation of a sentence thereof, remains in effect today.[131] While Professor Corwin is correct in recognizing that "[t]he President's power of dismissal in time of war Congress has never attempted to limit, and it remains absolute,"[132] the fact remains that under the Constitution "[t]he President's military powers exist in times of peace as well as during war."[133] Certainly it is common for presidential power to increase dramatically during wartime, but this is not because of any change in constitutional authority--it is because Congress during hostilities tends to delegate many of its *own* constitutional powers to the President in broad terms during a crisis.[134] Since under the *Myers/Humphrey's Executor* doctrine Congress doesn't possess the power to restrict the President's removal of executive officers either in peacetime or during war, the statute prohibiting dismissals not approved by a court martial is not saved by its exemption of wartime dismissals. It would appear to be unconstitutional.

(e) the "executive prerogative"

The American government is an entity of limited and delegated powers. Former President William Howard Taft summarized what I believe to be the proper view[135] in *Our Chief Magistrate and His Powers*:

> The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific

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[130] *Id.* at 631-32.

[131] 10 U.S.C. §804.

[132] E. CORWIN, THE PRESIDENT; OFFICE AND POWERS, 1787-1984 at 296 (1984).

[133] W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 234 (2d ed. 1934). Indeed, the President's most important military function may be to deter aggression and thus prevent war from occurring. Nevertheless, even the Supreme Court has on occasion referred to the President's "powers as Commander in Chief of the Army in time of war and of grave public danger . . . ." *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

[134] See, e.g., L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 300 (1985). It might also be said that the President's power (or at least that of the "government") increases *vis-à-vis* competing interests of citizens that are "balanced" by the Court, such as Freedom of Speech.

[135] But see Theodore Roosevelt's contention that the President had the right and duty to do "anything that the needs of the Nation demanded, unless such action was forbidden by the Constitution or by the Laws." 20 THE WORKS OF THEODORE ROOSEVELT 347 (1926), quoted in L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 23 (1985).

> grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.[136]

Depending upon how broadly one interprets the grant to the President of the "Executive" power, this doctrine may not apply to the field of foreign affairs. Thus Professor Louis Henkin, in his impressive study, *Foreign Affairs and the Constitution*, writes: "By *Curtiss-Wright* the basic constitutional doctrine that 'the Federal government can exercise no powers except those specifically enumerated in the Constitution' does not apply to foreign affairs."[137] Whether one accepts Justice Sutherland's view in *United States v. Curtiss-Wright Export Corp.*[138] that "the powers of external sovereignty" passed directly from the British Crown "not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America"[139]--and thus that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution"[140]--or the position expressed by Hamilton and others that general control of foreign affairs was included in the grant of "[t]he executive power"[141] to the President, it is generally acknowledged that the President has important discretionary powers not enumerated in Article two, Sections two and three, of the Constitution.

Some authorities go even further, and attribute to the President a Lockean "prerogative" to ignore the laws and even the Constitution in time of national emergency. Writing in his *Second Treatise of Government* in 1690, Locke argued:

> Where the Legislative and Executive Power are in distinct hands, (as they are in all moderated Monarchies, and well-framed Governments) there the good of the Society requires, that several things should be left to the discretion of him, that has the Executive Power. . . . Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him, as the publick good and advantage should require: nay, 'tis fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and

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[136] W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916). But see L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 23 (1985). In *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure Case), 343 U.S. 579 (1952), Mr. Justice Black for the Court said: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585.

[137] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 31 (1972).

[138] 299 U.S. 304 (1936).

[139] *Id.* at 316.

[140] *Id.* at 318. Sutherland continues: "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." *Id.*

[141] U.S. CONST. art. II, sec. 1. Compare this with the grant of "[a]ll legislative powers *herein granted*" [emphasis added] to the Congress in Article I, sec. 1.

> Government, *viz*. That as much as may be, all the Members of the Society are to be preserved. . . .
>
> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative*.[142]

Professor Sofaer argues that both Madison and Hamilton may have embraced "that part of Locke's description of prerogative that recognized an executive power to do what was necessary, though at the risk of being overruled or punished."[143] As President, Thomas Jefferson essentially *exercised* such a "prerogative" on at least two occasions; first in making the Louisiana Purchase (which he believed would have required not only legislative sanction but the approval of the people by constitutional amendment),[144] and secondly in committing expenditures of unappropriated funds and purchasing military supplies not authorized by Congress following the British attack on the American warship *Chesapeake* on 22 June 1807.

The *Chesapeake* had been disabled by cannon fire from the larger British warship *Leopard*, which then searched the American ship for British deserters. Three American sailors were killed and eighteen wounded during the fighting, and four crewmen were seized by the *Leopard*.[145] Congress was not in session. In describing and explaining his actions in his Seventh Annual Message to Congress, Jefferson said:

> The moment our peace was threatened, I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us; and I trust that the legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so

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[142] J. LOCKE, SECOND TREATISE OF GOVERNMENT §§159-60 (1690).

[143] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 59 (1976).

[144] Jefferson wrote: "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; and saying to him when of age, I did this for your good; I pretend to no right to bind you; you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines." 10 THE WRITINGS OF THOMAS JEFFERSON 411 (A. Lipscomb & A. Bergh, eds. 1903). Congress approved Jefferson's action overwhelmingly. *Id.* at 425.

[145] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 198-99 (1976).

> important to be done if then assembled. Expenses, also unprovided for, arose out of the necessity of calling all our gun-boats into actual service for the defence of our harbors; of all which accounts will be laid before you.[146]

Jefferson's theory of "prerogative" was set forth in some detail in a confidential[147] letter written after his retirement from the presidency to J. B. Colvin,[148] on 20 September 1810:

> The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written law is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. . . .
>
> After the affair of the Chesapeake, we thought war a very possible result. Our magazines were illy provided with some necessary articles, nor had any appropriations been made for their purchase. We ventured, however, to provide them, and to place our country in safety; and stating the case to Congress, they sanctioned the act. . . .
>
> From these examples and principles you may see what I think on the question proposed. They do not go to the case of persons charged with petty duties, where consequences are triffling, and time allowed for a legal course, nor to authoritze them to take such cases out of the written law. In these, the example of overleaping the law is of greater evil than a strict adherence to its imperfect provisions. It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives. [Emphasis in original.][149]

President Lincoln, in the initial stages of the Civil War, exercised a "prerogative" following the fall of Fourt Sumter on 12 April 1861--while Congress was in recess--by calling up 75,000 members of the state militia, suspending the writ of habeas corpus, and blockading southern ports. When Congress returned on 4 July, Lincoln explained that "whether strictly legal or not," his actions "were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."[150] Congress did, and when the blockade was challenged before the Supreme Court as unconstitutional Lincoln's use of force was upheld.[151]

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[146] 3 THE WRITINGS OF THOMAS JEFFERSON 450 (A. Lipscomb & A. Bergh, eds. 1903).

[147] "I have indulged freer views on this question, on your assurances that they are for your own eye only, and that they will not get into the hands of news-writers." 12 *id.* at 422.

[148] Colvin was the editor of the *Republican Advocate*, in Fredericktown, Maryland.

[149] 3 THE WRITINGS OF THOMAS JEFFERSON 418, 420-22 (A. Lipscomb & A. Bergh, eds. 1903).

Professor Edward S. Corwin, in his classic study, *The President: Office and Powers*, argued that the Founding Fathers had intended to incorporate a Lockean prerogative:

> The fact is that what the Framers had in mind was not the cabinet system . . . but the "balanced constitution" of Locke, Montesquieu, and Blackstone, which carried with it the idea of *a divided initiative in the matter of legislation and a broad range of autonomous executive power or "prerogative."* Sir Henry Maine's dictum that "the American constitution is the British constitution with the monarchy left out," is, from the point of view of 1789, almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also of course the hereditary feature. [Emphasis in original.][152]

With specific reference to the President's powers in wartime, writing in *Presidential Power and the Constitution* Corwin added:

> The concentration of power and responsibility demanded by war is apt to give a system grounded on the rigid maxims of republicanism a somewhat violent wrench. Fortunately the framers of the Constitution were not wholly unaware of the difficulty, which they proceeded to meet by conferring on the President as Commander-in-Chief of the army and navy all the prerogatives of monarchy in connection with war making except only the power to declare war and the power to create armed forces. The clause of the Constituion which makes the President Commander-in-Chief may accordingly be described as the elastic block of the closed circle of constitutionalism; in the heat of war the powers it confers are capable of expanding tremendously, but upon the restoration of normal conditions they shrink with equal rapidity. The true nature of the presidential prerogative in war time was comprehended by Lincoln perfectly . . . ."[153]

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[150] Quoted in L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 289 (1985).

[151] *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

[152] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 at 14-15 (4th rev. ed. 1957).

[153] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 23 (1976).

Whatever one might think of the wisdom of such a "prerogative," it must at best be recognized as an extreme and extra-constitutional power.[154] It doesn't imply that the Constitution sanctions its own breach in time of crisis, but rather that in a grave emergency power holders can intentionally exceed their authority to promote some perceived greater good--but in so doing they gamble that their unauthorized act(s) will subsequently be ratified or forgiven by their principal(s). If they miscalculate, the doctrine offers no shelter against impeachment or other punishment. So viewed--despite its obvious risks in encouraging abuse--the doctrine is not unreasonable.

2. Powers of the Congress

Despite the strong grants of exclusive and uncontrollable powers to the President for the conduct of military operations and foreign affairs, the Founding Fathers also vested in Congress vitally important powers in this area. While Congress was not expected to micro-manage or second guess executive discretion--indeed, Jefferson argued that not even the Senate, with its special responsibilities regarding treaties and diplomatic appointments, was "supposed by the constitution to be acquainted with the concerns of the Executive department"[155]--it is clear that the Founding Fathers intended that Congress have *final word* both on whether the United States should commence a "war,"[156] and also on what national resources were to be placed at the disposal of the President for military purposes.[157] As an additional check to ensure civilian control of the military, the Congress was also entrusted with the decision (to be exercised at no greater than two year intervals) of whether there should even *be* an army,[158] and with authority "to make rules for the government and regulation"[159] of military forces. Finally, the Congress was empowered to make all laws which are "necessary and proper"[160] to carry into execution not only its own powers, but also those of the President and the courts. As already noted, the Senate was also given important powers of its own in the national security field, such as a veto over treaties[161] (to guard, *inter alia*, against undesirable foreign alliances which might drag the nation into hostilities), and a veto over unfit appointments to federal office.[162]

These are all critical functions, and the Founding Fathers adopted them with the expectation that they be given full effect as safeguards of the rights of the American people. But it should also be kept in mind that, as "exceptions" to the general grant of Executive power to the President, it was expected that these powers be construed narrowly, and not be extended to infringe upon the independent discretionary powers conferred upon the President.

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[154] We use here the word *power* in the sense of "ability," not "right" or "privilege."

[155] 3 THE WRITINGS OF THOMAS JEFFERSON 17 (A. Lipscomb & A. Bergh, eds. 1903).

[156] U.S. CONST., art. I, sec. 8, cl. 11.

[157] *Id.* cls. 12, 13.

[158] *Id.* cl. 12 (limiting military appropriations to no more than two years).

[159] *Id.* cl. 14.

[160] *Id.* cl. 18.

[161] *Id.* art. II, sec. 2, cl.2.

[162] *Id.*

(a). the power to declare war

The constitutional framers were concerned with the general inefficiency of the Continental Congress to direct military operations, but they were equally if not more concerned about the prospect of any single individual having the power to thrust the nation into war.[163] Indeed, this concern was so great that--despite the recognized shortcomings of legislative war-making under the Articles of Confederation--the Constitution as reported by the Committee of Detail on 6 August 1787 vested in Congress the power "to *make* war. [Emphasis added.]"[164] The issue was debated by the full convention on 17 August, at which time James Madison and Elbridge Gerry "moved to insert '*declare*,' striking out '*make*' war . . . ."[165] The limited records of the debate indicate that this was supported in part to leave to the Executive "the power to repel sudden attacks,"[166] and on the theory that "[t]he Executive sh[ould] be able to repel and not to commence war"[167]; and also because the language "'*make*' war might be understood to 'conduct' it, which was an Executive function."[168] According to Madison's *Notes*, it was this last argument that persuaded Oliver Elseworth of Connecticut to change his vote to "aye," resulting in a final vote of eight to one in favor of the change.[169]

In a letter to Madison, Jefferson wrote from Paris in September 1789 with satisfaction that "We have already given . . . one effectual check to the dog of war, by transferring the power of declaring war from the executive to the legislative body, from those who are to spend, to those who are to pay."[170] Nearly nine years later, Madison explained the decision thusly: "The constitution supposes, what the History of all governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has, accordingly, with studied care, vested the question of war in the Legislature."[171]

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[163] See, e.g., statement of Elbridge Gerry (17 August 1787) that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 318 (1966).

[164] *Id.* at 182.

[165] *Id.* at 318.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 319; J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 476 n.* (1969).

[169] *Id.*

[170] 7 THE WRITINGS OF THOMAS JEFFERSON 461 (A. Lipscomb & A. Bergh, eds. 1903). Jefferson's contention that the power to declare war had been *transferred* from the executive suggests that he regarded it as by its nature an Executive function--particularly since it had been exercised by the Continental Congress prior to the convention, and had been vested in the Congress initially by the Committee of Detail as an element of the power to "make" war. This is consistent with Hamilton's view, expressed in his first *Pacificus* letter (discussed *supra.*). In his NOTES ON VIRGINIA, Jefferson wrote: "Never was so much false arithmetic employed on any subject, as that which has been employed to persuade nations that it is their interest to go to war." 2 *id.* at 240.

A similar explanation was provided by Representative Abraham Lincoln, in criticizing President Polk's military policies in Mexico, which Lincoln believed had made war virtually inevitable:

> The provision of the Constitution giving war-making [*sic*] power to Congress was dictated, as I understand it, by the folowing reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power to bring this oppression upon us.[172]

The proper relationship between Congress and the President involving war and other aspects of U.S. relations with other States was summarized by Professor Quincy Wright more than sixty years ago in *The Control of American Foreign Relations*:

> In foreign relations . . . the President exercises discretion, both as to the means and to the ends of policy. He exercises a discretion, very little limited by directory laws, in the methods of carrying out foreign policy. He has moved the navy and the marines at will all over the world. *He has exercised a broad discretion in issuing both standing regulations* and instructions and special instructions for the diplomatic, consular, *military and naval services.* Though Congress has legislated on broad lines for the conduct of these services it has descended to much less detail than in the case of services operative in the territory of the United States. In . . . foreign affairs the President, also, has a constitutional discretion as the representative organ and as commander-in-chief which cannot be taken away by Congress and because of the extraterritorial character of most of his action, his subordinates are not generally subject to judicial control. . . . Though Congress may by resolutions suggest policies its resolutions are not mandatory and the President has on occasion ignored them. *Ultimately, however, his power is limited by the possibility of a veto upon matured policies*, by the Senate in the case of treaties, *by Congress in the case of war* . . . . In foreign affairs, therefore, the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the

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[171] Quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 143 n.* (1976). By "the *question* of war" Madison presumably was referring to the question of whether or not to *initiate* or "declare" a war.

[172] Quoted in E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 497 n.7 (1984).

> President, checked only by the veto of the Senate or Congress upon completed proposals.[Emphasis added.][173]

Thus, properly understood, the Constitution vests in the President supreme control over whatever military force Congress creates, with the important qualification that he may *not* use that force to intentionally initiate a "war"[174] without the affirmative approval[175] of a majority of both houses of Congress. (This means, among other things, that the President and the Senate, through the treaty process, may not properly initiate war.[176])

The question arose early in our history as to the power of the President to use force in defense of the United States without the approval of Congress in the event war were declared or made against the United States by a foreign State. It was clear and unchallenged that the President had at least the authority to use reasonable force "to repel sudden attacks," since that precise language was used when Madison and Gerry successfully moved in the Constitutional Convention to change the authority of Congress from that of *making* to that of *declaring* war. But in that same debate a potentially broader principle was suggested--that [t]he Executive sh[ould] be able to repel and not to commence war."[177] Unresolved was whether this was essentially a limited *prerogative* to act in an emergency while convening and seeking formal authority from Congress, or whether a decision by another State to initiate war against the United States placed the United States at war and made the power of Congress to veto a unilateral decision by the American President to bring about the same result irrelevant.

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[173] Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 149-50 (1922).

[174] The President may, however, use the military for many purposes that do not constitute "war" in a legal sense. See, e.g., R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 39 n.58 (1983) and sources cited therein.

[175] As an aside it might be noted that the form of legislative authorization is not important. Congress has frequently given constitutional authorization for hostilities--including the Vietnam war--by joint resolution. See R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 4-9 (1983). The constitutionality of this practice was upheld by the Supreme Court in *Bas v. Tingy*, 4 U.S. (4 Dal.) 37, 40 (1800), and again the following year in *Talbot V. Seeman*, 5 U.S. (1 Cranch) 1, 27 (1801).

[176] See, e.g., Jefferson's statement that, while the President and the Senate by treaty can change a state of war into a state of peace, "the Constitution expressly requires the concurrence of the three branches to commit us to the state of war." 14 THE WRITINGS OF THOMAS JEFFERSON 445 (A. Lipscomb & A. Bergh, eds. 1903): See also, Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1798-99 (1968). It could be *argued* that, since a treaty is the "supreme law of the land" (U.S. CONST. art. VI), and by Article 5 of the NATO Treaty (63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 [1949]) the Parties "agree that an armed attack against one or more of them . . . shall be considered an attack against them all," that the "constitutional processes" called for in the treaty *vis-à-vis* the United States permits the President to respond to the attack without action by Congress. After all, if under the Constitution the President needs no congressional authority to respond to "sudden attacks" against the United States, and if the "supreme law of the land" provides that an attack against a NATO ally shall legally be treated as an attack on the United States, there is a certain logic in permitting such an Executive response. However, this is not only inconsistent with assurances given the Senate at the time of its consent to ratification of the NATO Treaty, it also doesn't really get around the exclusive power of *Congress* "to declare war." Just as in *Klein v. United States* (discussed *supra*) it was held the Congress could not abuse its otherwise unlimited control over the jurisdiction of the courts as a means of depriving the President of his pardon power, so, too, the treaty power can not be abused to violate other provisions of the Constitution (*Geofroy v. Riggs*, 133 U.S. 258, 266-67 [1890]).

[177] See 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 318 (Statement of Mr. Sharman.)

The issue first presented itself during a dispute with the Barbary powers in the early days of the first Jefferson administration. During a meeting of Jefferson's cabinet on 15 May 1801, Secretary of the Treasury Albert Gallatin--who by any standard must be regarded as an advocate of limited Executive power in this area[178]--argued that the Executive "cannot put us in a state of war, but if we be put into that state either by the decree of Congress or of the other nation, the command and direction of the public force then belongs to the [Executive]."[179] This view was supported overwhelmingly by the Cabinet. The Secretary of the Navy promptly dispatched a naval squadron, commanded by Captain Richard Dale, with the following instructions:

> I am . . . instructed by the President to direct, that you proceed with all possible expedition, with the squadron under your command, to the Mediterranean. . . . [S]hould you find on your arrival at Gibraltar that all of the Barbary Powers, have declared War against the United States, you will then distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence--by sinking, burning or destroying their ships & Vessels wherever you shall find them . . . .[180]

For reasons probably more political than philosophical, Jefferson was extremely deferential (and less than candid) in reporting this incident to Congress and seeking affirmative approval for further hostilities. In his first annual message to Congress, he described an engagement that had taken place between the U.S. schooner *Enterprise* and a Tripolitan cruiser, and reported: "Unauthorized by the constitution, without the sanction of Congress, to go beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew." Jefferson suggested that "[t]he legislature will doubtless consider whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries."[181] Official naval documents which have subsequently been made public have established clearly that the decision to disable and set free the Tripolitan warship was made by Captain Dale for *logistical* reasons, and that his orders were such that had the same ship been encountered by the *Enterprise* a day later it would have been *captured* and retained.[182] Nevertheless, whatever his motivation in being less than candid with Congress, Jefferson's extremely restrictive statement of executive war powers has caused substantial confusion about the constitutional separation of war powers in subsequent years.[183]

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[178] For years as a member of Congress Gallatin fought almost single-handedly to block general (as opposed to specific) appropriations for military affairs.

[179] Quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 209 (1976).

[180] 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465, 467 (C. Swanson, ed. 1939). Unknown to the United States at the time, the Bey of Tripoli had declared war against the United States nearly a week before these instructions were given. *Id.* at 454-59.

[181] 3 THE WRITINGS OF THOMAS JEFFERSON 329 (A. Lipscomb & A. Bergh, eds. 1903)

Jefferson's decision to authorize the use of force against the Bey of Tripoli was well received, but his statement of the constitutional powers of the Executive came under sharp cirticism. Alexander Hamilton, for example, argued:

> It is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.[Emphasis in original.][184]

A massive study of the Constitution prepared by the Congressional Research Service of the Library of Congress, in discussing this dispute, concludes that Congress by its actions "apparently accept[ed] Hamilton's view."[185] This interpretation was also embraced by the Supreme Court in affirming the legality of President Lincoln's blockade of southern ports during the Civil War in the *Prize Cases*:

> By the Constitution, Congress alone has the power to declare a national or foreign war. . . . [The President] has no power to initiate or declare a war either against a foreign nation or a domestic state. . . . [But] if a war be made by invasion of a foreign nation, the President is not only authorized

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[182] The engagement occurred while the *Enterprise* was en route to Malta to obtain water for the rest of the squadron. Captain Dale's orders provided that: "In your Passage to and from Malta you will not chace out of your way *particularly in going, as you have not much water on board* . . . . Should you fall in with any of the Tripolitan Corsairs that you are confident, you can Manage, on your Passage *to* Malta you will heave all his Guns Over board Cut away his Masts, & leave him In a situation, that he can Just make out to get into some Port, but if *coming back* you will bring her with you if you think you can doe it with safety. [Emphasis added.]" 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 534-35 (C. Swanson, ed. 1939).

[183] Robert Scigliano (*The War Powers Resolution and the War Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 138 (J. Bessette & J. Tulis, eds. 1981) writes: "Advocates of the War Powers Resolution turn to [Jefferson] perhaps more often than to any other founder as authority for their opinion that the president's war power was limited to meeting attack."See also, Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1779 (1968).

[184] 7 WORKS OF ALEXANDER HAMILTON 746-47 (J. Hamilton, ed. 1851).

[185] THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 327 (U.S. Senate, 92d Cong., 2d Sess., Doc. No. 92-82, 1973). See also, Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1784 (1968): "In the event of an armed attack on the United States territory itself, Congress' decision whether or not to go to war is not simply bypassed as obvious; it is recognized as being completely superfluous: the President is simply assuming his wartime role as Commander in Chief in a situation in which the decision to resort to war has been taken out of the country's hands by the unilateral action of another state."

> but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."[186]

The better view therefore seems to be that the President, as Commander-in-Chief, may not commit the United States to war, but once war is authorized by Congress *or imposed upon the United States by the actions of another State*, the President as Commander-in-Chief is solely responsible for the strategic and tactical conduct of the war. However, this still leaves some unsettled questions. While Congress may not direct the President to attack a specific target, or to employ (or not to employ) military forces to a particular location, it still retains certain "checks" on the President's conduct of the war through its exclusive powers to "raise and support" military forces, and its authority to "make rules for the government and regulation" of the forces. And between the powers of Congress and those of the President--despite the general principle that, as exceptions to the general grant of Executive power to the President, the powers of Congress in this field should be construed narrowly[187]--there remain serious gray areas of uncertain power.[188]

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[186] *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). See also *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1872), unanimously establishing the date of Lincoln's blockade proclamation as the official beginning of the Civil War.

[187] See discussion *supra*.

[188] For example, how far under its power to "declare war" can Congress limit the theater of battle (i.e., can the President expand the war into neighboring States if in his judgment it will promote victory in hostilities approved by Congress or initiated by an enemy attack upon the United States), and can Congress place constraints upon the employment of specific weapons systems (e.g., restrict the first use of nuclear or other weapons of mass destruction on the theory that such an act constitutes the commencement of a "new" war)? A reasonable (but uncertain) answer to the former is that the Commander-in-Chief may expand the theater of war if in his judgment doing so is essential to defending the country from imminent attack (e.g., if he has reliable information that the third State is about to launch an attack on U.S. forces engaged in lawful hostilities)(see, e.g., *Durand v. Hollins*, 8 Fed. Cas. 111 (No. 4186)(C.C.S.D.N.Y. 1860); and *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)). With regard to the second question, both theory and historical practice suggest that the answer is "no," but see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 108 (1972). For an argument that Congress may not limit the President's power to use force to "defensive" measures, see A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 462-63 n.214 (1976).

(b) the power to "raise and support"armed forces

The Constitution gives to Congress both the power to "raise and support armies" and to "provide and maintain a navy."[189] Appropriations for the army are limited to a term not longer than two years[190]--a specific reflection of the great fear among the Founding Fathers of standing armies. Although the power to raise armies had historically been regarded as an "Executive" function, even in England its inherent danger to the rights of the citizens had led to a provision in the Declaration of Rights of 1688 requiring the consent of Parliament for the maintenance of standing armies.[191]

Indeed, the hostility toward large standing armies was such that during the Convention of 1787 Elbridge Gerry proposed an amendment to place a constitutional limit on the size of any such army. Farrand reports:

> Mr. Gerry took notice that there was (no) check here agst. standing armies in time of peace. The existing Congs. is so constructed that it cannot of itself maintain an army. This wd. not be the case under the new system. . . . He thought an army dangerous in time of peace & could never consent to a power to keep up an indefinite number. He proposed that there shall not be kept up in time of peace more than thousand troops. His idea was that the blank should be filled with two or three thousand.[192]

Constitutional historian Charles Warren, in *The Making of the Constitution*, describes what occurred next:

> Luther Martin supported [Gerry]. At this point in the Convention, . . . General Washington, who was in the Chair and therefore could offer no motion, turned to a delegate who stood near and in a whisper made the satirical suggestion that he move to amend the motion so as to provide that "no foreign enemy should invade the United States at any time, with more than three thousand troops." To the same effect, General Pinckney asked "whether no troops were ever to be raised until an attack should be made upon us: and Dayton observed that "preparations for war are generally made in peace; and a standing force of some sort may, for aught we know, become unavoidable." Gerry's motion was unanimously rejected.[193]

Instead, an alternative check against Executive excess was imposed, by requiring affirmative approval by Congress to raise armies, and limiting appropriations for their support to no greater than a period of two years. Although primarily motivated by a fear of standing armies that no longer occupies so high a place in public concern, this power nevertheless vests in Congress broad and important powers. Professor Pomeroy writes:

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[189] *Id.* cl. 13.

[190] *Id.* cl. 12.

[191] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1187 (1833).

[192] 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 329 (1966).

[193] C. WARREN, THE MAKING OF THE CONSTITUTION 482-83 (1937).

> Under its authority to raise armies, maintain navies, furnish supplies, and the like, Congress may direct the manner in which the President's power shall be exercised, for he will be, in fact, but executing its commands. Thus it may determine how many men shall be enlisted in each branch of the service, or what and how many armed vessels shall be constructed. As Congress is to make all appropriations, it may declare the specific purpose for which money is to be used; what forts shall be erected, and their cost; what ships built, their character and cost; what kind of arms purchased or manufactured and the cost. In all these cases great or little discretion may be left to the Executive and his subordinates, as the legislature deems best.[194]

There are, however, constitutional limits on how Congress may use these important powers. Pomeroy explains:

> The President's duties in respect to these various subjects may thus be clearly defined and controlled by the legislature. But in time of peace he has an independent function. He commands the army and navy; Congress does not. He may make all dispositions of troops and officers, stationing them now at this post, now at that; he may send out naval vessels to such parts of the world as he pleases; he may distribute the arms, ammunition, and supplies in such quantities and at such arsenals and depositories as he deems best.[195]

This distinction between the power to raise and support armies, and the power to command them, is important. To permit Congress to use its power to raise and support armies in such a way as to interfere with the command function would be inconsistent with both the spirit and the letter of the Constitution. As George Mason explained during the Virginia ratification convention, the Congress would have power to raise armies, which "then the President is to command *without any control*. [Emphasis added.]"[196] Similarly, Congressman John Randolph argued that the only congressional control over troops would be the power to withhold supplies: "as to how, or where, or when they shall be employed, this House has no control whatever."[197] This point has been emphasized time and again by scholars.[198]

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[194] J. POMEROY, INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 590-91 (1886).

[195] *Id.* at 591.

[196] Quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 52 (1976).

As with other areas related to national security matters, the early congresses tended (with some exceptions) to be very deferential to the President in making appropriations for military expenses. Although the Republicans (particularly Albert Gallatin and Jefferson) were critical of the practice of appropriating gross sums for broad categories of military purposes, to be expended by the President as he deemed desirable--and, indeed, as President, Jefferson appointed Gallatin to be Secretary of the Treasury and recommended in his first annual message to Congress that this practice be abandoned[199]--experience in office soon persuaded both Jefferson and Gallatin of the wisdom of discretionary appropriations. Professor Sofaer writes that "appropriations practice under Jefferson soon became largely indistinguishable from practice during the Federalist period."[200] Elaborating, Professor Sofaer continues:

> [W]hen funds appropriated for a purpose, general or specific, ran out, the Republican Secretaries of War and Navy continued the practice begun as early as 1794 of incurring deficiencies, and Congress invariably appropriated the necessary funds after the fact. Jefferson himself suggested this course to Gallatin, for expenses incurred in sending an extra vessel to Morocco in 1802. On one other occasion, Madison joined with Jefferson in construing an appropriation more broadly than Gallatin.
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> An exchange in April 1806 between Representative David R. Williams of South Carolina and John Randolph of Virginia exemplifies the extent to which Republicans had accepted prior practice by that time. Williams, a vehement opponent of all naval spending, objected to Randolph's motion to provide a single appropriation of $411,950 "for repair of vessels, store rent, pay of armorers, freight, and other contingent expenses." Williams moved to strike "contingent expenses," asking Randolph as Chairman of the Committee on Ways and Means to explain

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[197] *Id.* at 273.

[198] E.g., Berdahl writes: "As a necessary part of his power to direct the military and naval operations, the President in time of war has entire control of the movements of the army and navy. Congress has, under the Constitution, the sole power to raise and support armies and to provide and maintain a navy; but after the forces have been provided and war has been begun, the President may order them anywhere he will for the purpose of carrying on the war to a successful conclusion." C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 121 (1921). See also W. WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 82 n.* (43d ed. 1871)("Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements, and measures essential to overcome the enemy,--for the general conduct of the war,--the President is responsible to and controlled by no other department of government."

[199] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 170 (1976). Jefferson's request was actually somewhat qualified, calling for "appropriating specific sums to every specific purpose susceptible of definition . . . ." *Id.* One of the reasons Congress tended to grant more discretion in military and foreign affairs appropriations was precisely the difficulty of determining a year in advance what specific expenditures would best serve the national security interest.

[200] *Id.*

> what expenses were meant to be "contingent." Randolph, by this time at odds with Jefferson, said "he was as much in the dark as the gentleman as to the items of contingent expenditure . . . ," and that the Secretary of the Navy had asserted "without entering into any explanation" that the sum was not too large. He would not have moved so large a sum, Randolph said, "but from the conviction that whether they provided the money or not, it would be spent, and an additional appropriation made the next session"; an appropriation bill, in these circumstances, was "a mere matter of form."
>
> The Committee of the Whole approved the sum suggested by Randolph, but Williams urged the House to strike the appropriation for "contingent expenses" until the Secretary of the Navy supported it with more than a mere opinion. Federalist Samuel Dana, who opposed specific appropriations for the armed services, crowed that the administration's opposition to Williams's amendment proved that the theory espoused in the President's first annual message "could not be carried into effect, as to the military or naval service." Republican Roger Nelson of Maryland in effect agreed. He described himself as having been "very early in favor of specific appropriations," but claimed that Jefferson's policy--"founded in good sense"--had never been intended to apply "to such a case as this," since the unforseeable necessities of naval and military expenditures required flexibility. While "an adherence to specific appropriations was highly desirable in all cases where it was practicable, as in meeting civil expenses, . . . for military purposes, they must necessarily go in the old way." The motion to make the appropriation specific was defeated, and the bill passed without a division.[201]

Although under its constitutional power to "raise and support armies" Congress has broad power to specify the locations of fortifications, the early practice was again to appropriate funds permitting broad executive discretion. Sofaer notes that during the presidency of John Adams, Congress conferred "broad discretion over a variety of military matters." He writes:

> Congress adopted a general appropriation for fortification, for example, despite efforts to specify the places to be fortified and the amounts to be spent at each place; proponents successfully urged that the President be allowed to decide these matters, even to the point of not spending the funds if that course seemed advisable.[202]

Like the power to "declare war," the power to "support armies" was probably intended to serve essentially as a check--with Congress, either because it disapproved a particular venture or because of competing demands on scarce resources, having authority to veto a project recommended by the President; but not with the expectation that Congress would routinely substitute its own technical judgment for the President's by funding construction of unwanted forts or acquiring unwanted weapons.[203] The early expectation was probably accurately reflected in an 1822 report of the House Committee on Military Affairs, which stated:

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[201] *Id.* at 171-72.

[202] *Id.* at 144.

> The committee are further agreed, that it is the peculiar province and duty of the Executive Department of Government to select and determine on the proper sites, and on the nature and extent of the fortifications to be constructed. This power and this duty appertain necessarily to the President, who is commander of the national force, and is responsible for the national defence.
>
> On the other hand, the means of carrying into effect the plans and designs of the Executive, are constitutionally and necessarily dependent on appropriations of money made by Congress. In the exercise of this power, which is exclusive on their part, it is the duty of Congress to inquire and examine into the nature, extent, necessity, or utility, of every object for which appropriations are required, and to judge of the expediency of granting or withholding them.[204]

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[203] I am addressing here what I perceive to have been the original expectations, and am not arguing that Congress lacks the *power* to impose such decisions on an unwilling Commander-in-Chief if it so wishes (although that case might be argued).

[204] Quoted in *id.* at 460 n.190. In another incident, when a proposal was introduced to authorize the President to build steam batteries as he saw fit to defend New Orleans, Congressman Daniel Webster objected that it was improper for Congress to limit the President's authority as Commander-in-Chief by directing where the batteries should be placed. Webster's position carried the day. *Id.* at 462 n.214.

(c) "rules for the government and regulation" of the military

The central authority of Congress to influence the organizational structure of the Defense establishment is derived from its power "To make rules for the government and regulation of the land and naval forces . . . ."[205] The parameters of this power are not further set forth--save by the principle that it must be exercised in a manner consistent with the other provisions of the Constitution[206]--and the records of the Constitutional Convention are no more helpful; reporting only that it was added "from the existing Articles of Confederation" without apparent debate.[207] Since under the Articles of Confederation the legislature had plenary control over all military affairs,[208] and it is clear from the discussions *supra* that a major objective of the new Constitution was to give the new President a substantial portion of control over the military, we are left with little direct guidance as to the meaning of this provision.

The core of the power is probably reflected in the substantive and procedural criminal rules embodied in the Uniform Code of Military Justice, which governs the conduct of all servicemen,[209] and the treatises often appear to deal with the clause as if this is its total content.[210] This is probably because this is a fruitful area for litigation, while the power of Congress to enact statutes "organizing" the military has, with few exceptions,[211] been assumed.

Whatever the limits to this grant of power--and this issue will be discussed *infra* [212] in more detail--two things about its history are worth noting. From the earliest days of constitutional practice it was recognized by both political branches of the government that Congress possessed the *authority* to structure the military establishment in great detail if it so wishes; but the traditional practice was for Congress to delegate to the President or his cabinet secretaries the task of proposing the plan of organization,[213] and also to provide waiver authority permitting broad Executive reorganization. For example, on 5 March 1792, Congress passed "*An Act for making farther and more effectual Provision for the Protection of the Frontiers of the United States,*" which provided in part:

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[205] U.S. CONST., art. I, sec. 8, cl. 14.

[206] E.g., it cannot be used to divest the President of the command of the military forces.

[207] 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 330 (1966).

[208] We speak here in terms of legislative-executive relations, not federal-state. We do not suggest that the Continental Congress had plenary authority over state militia.

[209] See Uniform Code of Military Justice of 1950, 64 Stat. 107, as amended by the Military Justice Act of 1968, 82 Stat. 1335, 10 U.S.C. § 801 *et seq.*

[210] See, e.g., CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICAN: ANALYSIS AND INTERPRETATION 332-34 (Sen.Doc. 92-82, 92d Cong. 2d Sess. 1973).

[211] See discussion in Section VI.

[212] *Id.*

[213] See, e.g., 9 ANNALS OF CONGRESS 2547 (1978).

> SEC. 3. *Provided always, and be it further enacted,* That it shall be lawful for the President of the United States to organize the said five regiments of infantry, and the said corps of horse and artillery, as he shall judge expedient, diminishing the number of corps, or taking from one corps and adding to another, as shall appear to him proper, so that the whole number of officers and men shall not exceed the limits above prescribed: *Provided,* That the said three regiments shall be discharged as soon as the United States shall be at peace with the Indian tribes. [Emphasis in original.][214]

Indeed, not only was Congress generally deferential to the President in matters pertaining to defense organization, but it is clear that some members believed that it was constitutionally improper for Congress to "intrude into the *management* of the army [emphasis added]"[215]--a view, it might be noted, not entirely foreign to the authors of the *Federalist Papers*.[216]

The better view is probably that Congress has virtual plenary power to make "rules" for the "government and regulation" of the military establishment, in whatever degree of detail it so wishes, so long as in so doing it does not interfere with the exclusive power of the President to "command" whatever military force Congress in its wisdom chooses to establish. These limitations will be discussed in more detail in Section VI.

(d) other constitutional powers of congress

Article two, Section two, of the Constitution--which provides for diplomatic and other appointments "with the advice and consent of the Senate"--vests in the President the power to "appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and *which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments*. [Emphasis added.]" This gives Congress additional control over the military departments, and--especially when read in conjunction with other legislative powers--would further support broad congressional discretion in the structure of defense forces.

Once again, however, congressional discretion in the exercise of this power would seem to end at the point it infringed upon the independent powers of the President. Thus, although in the case of *Ex parte Henner* [217]the Supreme Court concluded that the President had no power to remove inferior officers whose appointments had been vested by Congress in departmental heads (on the principle that the removal power is a component of the power to appoint), the President's special status as Commander-in-Chief might well preclude such an interpretation with respect to military officers. At present all officers are appointed by the President, and their commissions expressly state that they serve at his pleasure, so the point is not critical. Further, so long as the President retains the power to dismiss the Secretary of Defense, the likelihood that the Secretary will refuse to implement constitutionally permissible personnel actions requested by the Commander-in-Chief will probably remain largely illusory.

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[214] 1 Stat. 241 (1792).

[215] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 272 n.* (1976).

[216] See, e.g, Federalist No. 71 at 487 (J. Cooke ed., 1961)(A. Hamilton).

[217] 38 U.S. (13 Pet.) 259 (1839).

Another important congressional power is embodied in the so-called "necessary and proper" clause of Article one, Section eight. By this clause, the Constitution grants to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." This is a sweeping and important clause, but one especially subject to abuse if misinterpreted. Indeed, Jefferson expressed deep concern in 1791 that a broad construction of this clause would allow it to "swallow up all the delegated powers, and reduce the whole to one power . . . ."[218]

As with the other congressional powers we have discussed, the "necessary and proper" clause "does not override other provisions of the Constitution."[219] The landmark Supreme Court case on this clause was *McCulloch v. Maryland*, in which Chief Justice John Marshall set forth the following test: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but *consistent with the letter and spirit of the constitution*, are constitutional. [Emphasis added.]"[220] More recently, in the 1976 case of *Buckley v. Valeo*, the Court said:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in §9 of Art. 1. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointment Clause by clear implication prohibits it from doing so.[221]

How these specific powers and limitations impact upon the process of reorganizing the Department of Defense and its component elements will be considered in Section VI.

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[218] 3 THE WRITINGS OF THOMAS JEFFERSON 149 (A. Lipscomb & A. Bergh eds. 1904).

[219] *Consumer Energy Etc. v. F.E.R.C.*, 573 F.2d 425, 455 (D.C. Cir. 1982).

[220] *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316 (1819).

[221] *Buckley v. Valeo*, 424 U.S. 1, 134 (1976).

VI

LEGAL AUTHORITY AND CONSTRAINTS IN ALTERATION OF DEFENSE ORGANIZATION

A. General Discussion

The Department of Defense and its component elements perform more than one function, and it is highly useful to distinguish between these functions in assessing the relative powers to make changes in the defense organization of the President, subordinate Executive agencies such as the Secretary of Defense, and the Congress.

General William Y. Smith,[1] writing in *Reorganizing America's Defense: Leadership in War and Peace*, has given this description of the functions of the military chain of command:

> The military chain of command must basically perform three functions. It must execute orders from above and issue guidance and orders to subordinates; particularly, it is responsible for making and issuing the combat decisions necessary for the conduct of battle in time of war. This is what usually comes to mind when people think about the chain of command, but it is not the only thing the chain of command does. It must also pass advice and recommendations up the chain. . . . Finally, the military chain of command must allocate resources. At the lowest levels of command this may mean deciding how to use best the existing, in-place resources on a particular day. Ath the highest level it includes not only that decision, but also the current allocation of resources to produce the desired type of military capabilities in the future.[2]

To perform these functions, Smith notes, there are really two separate[3] "chains of command," which he characterizes as the "operational" chain down through the Joint Chiefs of Staff, and the "administrative" chain down through the military departments.[4] In a 1983 study published by the National Defense University, Dr. Archie D. Barrett draws an essentially identical distinction between what he dubs the "employing" and "maintaining" functions of defense structure.[5]

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[1] U.S.A.F., Ret.; formerly Deputy Commander-in-Chief, United States European Command.

[2] Smith, *The U.S. Military Chain of Command--Present and Future*, in REORGANIZING AMERICA'S DEFENSE 293 (R. Art, V. Davis & S. Huntington, eds.1985).

[3] Although with some overlapping membership (see chart inside front cover).

[4] Smith, *The U.S. Military Chain of Command--Present and Future*, in REORGANIZING AMERICA'S DEFENSE 293 (1985).

[5] A. BARRETT, REAPPRAISING DEFENSE ORGANIZATION 44 (1983).

The terms are not important, but for our purposes the distinction is critical. Because, as discussed in Section Five, the Founding Fathers intended the President to have virtually unconstrained[6] command of whatever military force Congress saw fit to provide. Despite their deep concern about "standing armies" and the possibility of Executive abuse of power, the constitutional framers realized that giving the Legislature a direct role in operational military decisions was a recipe for inefficiency, a lack of accountability, and almost certain operational failure.[7] While General Smith is not *wrong* when he writes that the "[c]hecks and balances" pertaining to defense activities "entail limits on efficiency and effectiveness,"[8] it would be wrong to conclude that the Founding Fathers intentionally sacrificed military efficiency in order to protect against abuses of military power.

On the contrary, a central theme both in the convention debates and in the *Federalist Papers* was the need for military efficiency in order to protect the nation from foreign aggression. Rather than destroy *efficiency* by vesting control over military operations in the Congress--a system that had proven disastrous under the Articles of Confederation--the participants in the Convention of 1787 chose to give the President virtual *carte blanc* with respect to the operations of war, and provided effective checks against abuse by vesting in Congress the final decision to initiate "war," and final authority over the composition of the military force and its personnel and materiel resources. As a further check against Executive abuse, Congress was required to limit defense appropriations to periods of no greater than two years at a time.

B. Alteration by Executive Action: Authority and Constraints

1. Authority for Presidential Alteration

It is useful to divide the powers of the President to organize or reorganize the defense structure into three categories: the President's independent Constitutional powers, the powers which the President shares concurrently with Congress, and the powers which the President can only exercise with the formal approval of Congress. The first category of these powers is largely beyond the direct or indirect control of Congress (save by refusing to raise an army to be commanded), the second gives the President significant authority to act so long as Congress remains silent, and the third includes[9] important powers which the President may exercise only as an "agent" of Congress. Although for rather compelling pragmatic reasons it has generally been regarded as unwise to do so, Congress has broad authority to restrict or control the President's exercise of the second and third categories of power.

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[6] Unconstrained except as expressly provided in the Constitution. Thus the President may not properly use the military to initiate an offensive "war" against another State without affirmative legislative approval, nor to accomplish any other end prohibited by the Constitution.

[7] See, e.g., FEDERALIST No. 70 at 471, 476 (J. Cooke, ed. 1961) (A. Hamilton).

[8] Smith, *The U.S. Military Chain of Command--Present and Future*, in REORGANIZING AMERICA'S DEFENSE 293 (1985).

The most important of the President's independent powers is his function as Commander-in-Chief. While Congress possesses complete discretion as to the size and character of the nation's military force--and even the power to direct that there shall be no such force--once a force is created Congress may not attempt to direct the manner in which the force shall be used to carry out the Commander-in-Chief function. Since the issue has not been dealt with by the Supreme Court, it is difficult to draw precise boundaries between the power of Congress to make "rules for the government" of the army, and the exclusive command function of the President; but in attempting to structure the "operational" or "employing" side of the command structure, the Congress is at its weakest point of authority. Since the President is charged by the Constitution with exclusive responsibility for this function, the spirit and possibly the letter of the Constitution mandate that he be given great if not complete flexibility in structuring this side of the chain of command. Indeed, since presidents during a developing crisis may well experience changes of mind with respect to the most effective means of organizing their command elements, and since statutes do not normally terminate at the expiration of a particular President's term of office, it may be inappropriate for Congress even to codify into law a particular incumbent President's preferences on "command" organization without incorporating a discretionary power for the President to reorganize as he deems necessary. Since the President is Commander-in-Chief both in time of peace and war, and since the nature of modern warfare makes it highly undesirable (and in some not unlikely situations perhaps impossible) that major reorganization be undertaken after war commences, it is arguably both bad law and bad practice to limit this flexibility to "time of war."

Even if Congress were to attempt to enact a detailed and inflexible structure for advising the President on military matters and issuing command decisions, this probably would not bind the President should he in practice choose to follow a different procedure. Indeed, the President's right to seek military advice would extend even to consulting individuals outside of the government if he so wished, so long as he did not attempt to formally appoint such persons as "officers of the United States" against the wishes of Congress. Professor Corwin has described as "eminently sensible" the view taken by

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[9] It is useful to keep in mind that the fact that Congress has by statute recognized the authority of the President to perform specific functions does not, *per se*, establish that the President's power to so act is derived from that of Congress. Thus, if Congress passed an act stating that the President was empowered to "command" a specific new military unit, this provision would not transform the President's authority as Commander-in-Chief from its independent constitutional basis into simply a congressionally delegated power (which would be subject to further regulation or limitation by Congress). This would be true even if the statute in question were worded as if granting power, e.g.: "The President is hereby authorized to command said unit . . . ." Since Congress does not possess any power to command, it may not by statute "delegate" that power to anyone.

President Theodore Roosevelt that Congress "cannot prevent the President from seeking advice," nor "disinterested men from giving their service to the people." Corwin notes that this view "has won out" in practice.[10] This qualification with specific reference to the power of Congress to establish the "chain of command" was recognized by Raymond J. Celada, of the Library of Congress's Congressional Research Service, who wrote:

> So long as the distinction is maintained between the creation of positions and the fixing of appropriate grades with respect to such positions on the one hand and *who the President actually consults in formulating and executing military policy on the other*, congressional authority to fix the chain of command is significant. [Emphasis added.][11]

It is highly doubtful that the Congress could effectively restrict the Commander-in-Chief either by requiring that he not give orders without first consulting with particular military (or civil) officers, or that he only issue orders through a specified officer.

While Congress does have a great deal of discretionary power to influence the organization of the defense establishment through its power to create offices (which may be qualified, for example, as to grade), it properly has very little influence in the process of selecting appointees for those offices.[12] This, by the Constitution, is vested in the President, subject only to the power of the Senate to veto unfit nominees. Congress may, however, determine whether a particular position may be filled by the President or an executive subordinate, or whether the nomination must first receive the "advice and consent" of the Senate. For the Congress to create an office, and by a narrow and exclusive definition of its qualifications attempt to limit the President to nominating a specific individual, would be an unconstitutional abuse of power.[13] So, too, would an effort by the Senate to continually veto all other candidates as a means of forcing the President to appoint an individual of the Senate's preference.[14]

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[10] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 74 (1976). See also, 27 Ops. Att'y Gen. 309, 310 (1910).

[11] Celada, *The Military Chain of Command*, in COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE, DEFENSE ORGANIZATION: THE NEED FOR CHANGE (STAFF REPORT) 27 (99th Cong. 1st Sess. S. Prt. 99-86, 16 Oct. 1985). See also, *id.* at 376.

[12] Other than the power to exclude categories of individuals by placing age, education, experience, or similar constraints on the position. This, obviously, is a significant power, and as will be discussed *infra* it is subject to abuse.

[13] As will be discussed *infra*, this has occurred in the past.

The President under his authority as Commander-in-Chief, and Congress under its Article one, Section eight, powers, have certain overlapping areas of responsibility in which either can act in the absence of contradictory action by the other. Both may act in such a way as to constrain or control the conduct of military personnel. Professor Henkin writes in *Foreign Affairs and the Constitution*:

> Although the President and Congress have large exclusive powers which each alone can exercise, there is clearly some uncertain zone in which each might act, at least when the other has not acted. For the reasons generally favoring Executive initiative, Presidents have successfully claimed to duplicate powers of Congress more often than Congress has been able to act in what is indubitably the President's domain, though exactly how much Congressional power Presidents could exercise on their own authority cannot be determined since they exercise so much by delegation from Congress. . . . Concurrence results where the President's powers as Commander-in-Chief overlap those of Congress to make the necessary rules for the government and regulation of the land and naval forces. No one can disentangel the war powers of the two branches . . . .[15]

The President normally carries out his command function by issuing orders or directives--either directly or by delegation through the Secretary of Defense--which control the activities of soldiers just as validly as any statute. Whether such acts infringe upon the power of Congress to "make rules for the government and regulation" of the military is often very difficult to ascertain. In 1853, Attorney General Caleb Cushing affirmed the independent right of the President to issue "directions and orders" that were "within the range of purely executive or administrative action," but noted:

> It is true, the question whether a regulation is legislative in its nature, or executive, and administrative, is not dependent on the length of the regulation, or the number of its articles. . . . But the length, arrangement, and other conditions of a document, may serve as indications,

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[14] Discussing a related possibility with respect to diplomatic appointments in 1790, Jefferson wrote: "It may be objected that the Senate may by continual negatives on the person, do what amounts to a negative on the grade, and so, indirectly, defeat this right of the President. But this would be a breach of trust; an abuse of power confided to the Senate, of which that body cannot be supposed capable. So the President has a power to convoke the Legislature, and the Senate might defeat that power by refusing to come. This equally amounts to a negative on the power of convoking. Yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the Constitution had meant to give the Senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not left it to be effected by a sidewind. It could never mean to give them the use of one power through the abuse of another. 3 THE WRITINGS OF THOMAS JEFFERSON 17-18 (A. Lipscomb & A. Bergh eds., 1903).

[15] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 104-05 (1972).

> among other things, of the quality of an act, as whether an act of legislation or an act of administration.[16]

Under International Law the Commander-in-Chief is responsible for the conduct of his subordinates, and under both customary and conventional law countries are required to maintain effective control over their soldiers so as to prevent violations of the laws of war. Customary international law "is a part of our law,"[17] and treaties such as the 1949 Geneva Conventions are by the Constitution expressly made part of the "supreme law of the land."[18] Even without his extraordinary powers as Commander-in-Chief, the President as chief Executive officer has the obligation to "take care that the laws be faithfully executed . . . ."[19] Thus, if Congress fails to exercise its authority to enact rules to regulate the armed forces, the President has at least some authority to act in its place. Professor Corwin writes:

> [T]he President is chief executive of the rules and regulations that Congress adopts for the internal government of the land and naval forces and for their safety and welfare. Also, in the absence of conflicting legislation he has powers of his own that he may exercise to the same ends. Up to 1830 courts-martial were convoked solely on the authority of the President as Commander-in-Chief. At the outset of the Civil War Lieber's Instructions for the Government of the Armies in the Field were promulgated on the same authority. During the First World War legislative provisions for the health of the forces were suplemented by executive orders.[20]

Thus, in *Kurtz v. Moffitt*, the Supreme Court gave effect in 1885 to executive regulations, promulgated without statutory authority, which provided rewards for the apprehension of deserters.[21]

By far the broadest powers of the President to "make rules" for the government or regulation of the military forces result from broad delegations by Congress. When the Supreme Court in 1842 said that "[t]he power of the executive to establish rules and regulations for the government of the army, is undoubted,"[22] the regulations in question had been promulgated pursuant to specific statutory authorization.[23] Under existing law the President is given power to "prescribe regulations to carry out his functions, powers, and duties" pertaining to the Armed Services.[24] Thus he may promulgate regulations to assist him in carrying out his responsibilities as Commander-in-Chief. He is also expressly given power by statute to "prescribe regulations for the government" of the military services.[25] While this authority does not, by itself,[26] empower the President to override specific statutory schemes for the regulation of the Armed Services; it does give him a great deal of authority to regulate matters Congress in its wisdom has recognized should be left to his discretion.

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[16] 6 Ops. Att'y Gen. 11, 16 (1853).

[17] *The Paquete Habana*, 175 U.S. 677 (1900).

[18] U.S. CONST. art. VI.

[19] *Id.* art. II, sec. 3.

[20] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1789-1984 at 295 (1984).

[21] *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885).

[22] *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 301 (1842).

[23] See *Smith v. Whitney*, 116 U.S. 167, 180-81 (1886), cited in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 305 n.35 (1972).

Particularly in the area of operational command, the Congress has traditionally been appropriately deferential to the Commander-in-Chief. Thus, under existing law, the President is empowered to "establish unified combatant commands or specified combatant commands to perform military missions,"[27] and to "prescribe the force structure of those commands."[28] And while Congress has by statute prescribed the functions of the Joint Chiefs of Staff, it is expressly provided that these duties are "[s]ubject to the authority and direction of the President and the Secretary of Defense . . . ."[29] During wartime the President has usually had additional authority to make organization changes,[30] and statutory limitations which constrain his authority to reorganize the military during peacetime are often suspended by their own provisions during war.[31]

2. Authority for Alteration by the Secretary of Defense

A recent staff study by the Senate Committee on Armed Services observed: "The Secretary [of Defense] has at his disposal a number of means by which he exercises authority, direction, and control over the Department of Defense. These include: authority to realign the organizational structure of the Department . . . ."[32] While not unlimited, the Secretary's power to issue directives and regulations affecting the organizational structure of the Department of Defense is very broad.

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[24] 10 U.S.C. §§ 121 (1982).

[25] *Id.* §§ 3061, 8061 (1982).

[26] However, if the President has independent constitutional authority to regulate an activity (for example, if the activity constitutes a necessary part of the Commander-in-Chief function), he might still be able to act contrary to a legislative expression of preference.

[27] 10 U.S.C. § 124(a)(1) (1982).

[28] *Id.* § 124(a)(2).

[29] *Id.* §§ 141(c), 142(c).

[30] See, e.g., C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 113 (1921). Berdahl writes that Section 1 of the Selective Service Act of 1917 empowered the President "to adjust the organization of the army and to add such new units as the character of the war showed to be necessary."

[31] E.g., 10 U.S.C. § 142(a) (1982) (removing the requirement, "in time of war declared by Congress," that the Chairman of the Joint Chiefs of Staff may not serve for more than two terms of two years each). This provision, and other similarly worded statutes, would be far more desirable if the reference to a "declaration of war" were omitted and in lieu thereof something like "authorized by Congress" substituted. Although beyond the scope of this study, it is our view that a "declaration of war" is an antiquated instrument of little contemporary value. No State has "declared war" since the late 1940s. Since under International Law such declarations have never been associated with *defensive* uses of force, and *offensive* uses of force are generally prohibited by the U.N. Charter and other treaties, by some schools of thinking the very act of "declaring war" would constitute *prima facie* evidence of international aggression. Since, as discussed in Section V, Congress may fulfill its constitutional role in approving the use of major armed force by joint resolution without "declaring war," it would be helpful if these statutes were updated.

The Secretary's authority to issue regulations is derived either from the President's constitutional power as Commander-in-Chief,[33] or from the authorization or ratification[34] by Congress. In addition to general statutory authority for heads of executive agencies to organize their departments,[35] historically it has been common for the Congress to give regulations adopted by the Secretary of War or the Secretary of the Navy--with the approval of the President--the force of law by incorporating them by reference in legislation. This, for example, was done with Army Regulations by an act of 24 April, 1816,[36] and in *United States v. Maurice* Chief Justice Marshall held that the statute should be "understood as giving to these regulations the sanction of law."[37] Similarly, the *Orders, Regulations and Instructions for the Administration of Law and Justice in the United States Navy*, issued by the Secretary of the Navy under authority of the President in 1870, were subsequently ratified by Congress by language which also encompassed subsequent modification by the Secretary. The statute provided that "the orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, *subject to alterations adopted in the same manner*. [Emphasis added.]"[38] In *Smith v. Whitney*, the Supreme Court held that such regulations had the effect of law.[39]

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[32] COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE, DEFENSE ORGANIZATION: THE NEED FOR CHANGE (STAFF REPORT) 27 (99th Cong. 1st Sess. S. Prt. 99-86, 16 Oct. 1985).

[33] *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885)("For many years, the Army Regulations, promulgated by the Secretary of War under authority of the President have [punished certain acts]. . . . The Army Regulations derive their force from the power of the President as comander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority.")

[34] Technically, of course, the Secretary can not derive "authority" to promulgate regulations by the possibility that Congress may at some time in the future approve his actions. However, should the Secretary exceed his authority, that infirmity can be rectified by subsequent congressional legislation approving the existing rules.

[35] 5 *Stat.* § 301, which provides that the heads of government agencies may prescribe regulations for the government of their departments. See *supra*, Section IV part 4(c)(6).

[36] 9 Stat. § 298 (1816).

[37] Quoted in *Smith v. Whitney*, 116 U.S. 167, 181 (1886).

[38] *Id.*

[39] *Id.*

3. Legal and Political Constraints on Alteration by Executive Action

There are obvious limits on the President's power to reorganize the Department of Defense. Unable to "raise" or "support" armies by his independent powers,[40] he is above all dependent upon Congress to create the various components of the military that are to be organized. In creating military forces, Congress has broad discretion to structure them in great detail if it so wishes--and the President may only properly resist this if in the process Congress interferes with his functioning as Commander-in-Chief. While within the scope of his independent powers, the President has authority to issue orders or directives which have the effect of making "rules" for the government of the military, outside of this sphere his "rule-making" power is limited. He may not undermine a properly enacted legislative provision, and even in the absence of legislation, he is arguably limited to promulgating orders of an "executive" character. In 1853 Attorney General Cushing addressed the legal status of a code of regulations "for the government of the naval service," which had been drawn up by the Secretary of the Navy and issued as a general order by the President. General Cushing wrote:

> The President, whether as Executive of the United States, or as commander-in-chief of the Army and Navy, has no legislative power of himself alone, except in his peculiar legislative relation to, and conjunction with, the two Houses of Congress. But the "System of Orders and Instructions" is, in my judgment, an act in its nature essentially and emphatically legislative, not executive, and, therefore, can have no legality, unless or until sanctioned by Congress, either by previous authorizations, or by subsequent enactment, neither of which grounds of legality does it possess.[41]

Eight years later, Attorney General Bates was asked whether President Lincoln possessed the authority to create a bureau within the War Department, to be headed by an Army officer who would be designated by the President as "Adjutant and Inspector General of Militia for the United States." The case may not be completely on point, since under the Constitution the President only becomes "Commander-in-Chief" of the *Militia* when it is called into the actual service of the United States"[42]; and Congress is given exclusive power not only "[t]o provide for calling forth the militia," but also "[t]o provide for organizing, arming, and disciplining the militia . . . ."[43] Nevertheless--although the Attorney General did focus on this distinction--the immediate issue at hand was the

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[40] Berdahl writes: "It is beyond dispute that without such [statutory] authority the President has no right to raise armies or provide for the Navy." He adds: "Nevertheless, there have been occasions when such power has been exercised without any legal sanction." C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 108 (1921). For a discussion of President Lincoln's action is raising a "great army" in 1861 "without awaiting the sanction of Congress," see *id.* at 110-11. See also the discussion of presidential prerogative in Section V.

[41] 6 Op. Att'y Gen. 11 (1853).

[42] U.S. CONST. art. II, sec. 2.

[43] *Id.* art. I, sec. 8, cls. 15, 16.

President's independent authority to modify the organizational structure of the Army and to create a new "office" without statutory authority, and the opinion is therefore useful. General Bates reasoned:

> By the Constitution he [the President] is Commander-in-Chief of the Army and Navy. As Commander-in-Chief he has the unquestioned power to establish rules for the government of the army, and the Secretary of War is his regular organ to administer the military establishment of the nation, and rules and orders promulgated through him must be received as the acts of the Executive, and as such are binding on all within the sphere of his just authority. [Citation omitted.] But this power is limited and does not extend to the repeal or contradiction of existing statutes, nor to the making of provisions of a legislative nature.

After noting the lack of presidential power "to provide for organizing, arming, and disciplining the militia," the Attorney General concluded:

> The President can no more exercise the powers confided to Congress than they can usurp the powers vested in him. If the President, to whom neither the Constitution nor Congress has committed the control of the militia, before they are called into service, may assume that control, of his own will, it is as clear a violation of the fundamental principles of constitution law as it would be for Congress to exercise the pardoning power. Each may exercise the powers conferred by the Constitution in the appropriate sphere, but neither may assume the powers which belong to the other. The creation of a bureau by the President in the War Department, with the scope and for the purpose proposed, seems to be prohibited by these familiar principles.
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> Doubtless the President may, in his discretion, detail an officer of the army to the special duty of transacting all business legally pertaining to the militia, and for that purpose may withdraw such business from the department to which it now belongs; but this order proposes for [*sic*? "far"?] more than this:
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> 1. It confers on an officer of the army a title unauthorized by act of Congress, and no rank or title in the service exists save by express enactment. . . .
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> 2. . . . I cannot avoid the conclusion that the creation of a bureau in the War Department can only be authorized by act of Congress, designating its chief, defining his duties, and providing for the appointment or transfer of the necessary clerical force and messenger.[44]

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[44] 10 Op. Att'y Gen. 11, 14-16 (1861).

As General Bates emphasized, the controlling principle here is separation of powers. As Commander-in-Chief, the President has general control over whatever military forces Congress in the exercise of its authority establishes. But unless the Congress abuses its rulemaking power so as to infringe upon the Commander-in-Chief function--a development most likely to occur in legislative efforts to structure in detail the "operational" chain of command--the power of Congress to organize the military establishment is virtually plenary.

There may also be technical constraints not of a separation of powers character that limit in theory the President's power to influence the organization of the Defense Department. Certain presidential authority, for example, may not be delegated without the approval of Congress. For example, the President could not vest his appointment power in the Secretary of Defense without legislative sanction.[45] (However, this technical limitation could be circumvented by delegating the power subject to the final "approval" of the President before an appointment is formally made.[46]) The controlling principle of executive delegation was set forth in a 1936 Attorney General opinion: "[T]he authorities indicate that the President cannot, without statutory authority, delegate a discretionary duty, relieving himself of all responsibility, so that the duty when performed will not be his act but wholly the act of another."[47]

Since the powers of the Secretary of Defense are derived entirely from delegations from the President or Congress, he is under the same basic constraints as the President. On matters pertaining to the command of military forces, he is entirely subordinate to the President and can be given no power by Congress that is superior to or independent of the President's control. While the President may not, in all instances, substitute his own discretionary judgment for that of subordinate executive branch employees,[48] he has full control over the conduct of his departmental heads in the fields of his independent constitutional authority--such as war and foreign affairs. Professor Corwin, referring to the debate over the establishment of the Department of Foreign Affairs in 1789, writes:

> Probably the earliest discussion of this highly important issue is the argument which was made by Madison in the first Congress in behalf of attributing the removal power to the President. It was "the intention of the Constitution," Madison contended, expressed expecially in the "faithfully executed" clause, that the first magistrate should be responsible for the executive departments, and this responsibility, he urged, carried with it the

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[45] 21 *id.* 355, 356; 29 *id.* 273, 274; 38 *id.* 457.

[46] *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1868).

[47] 38 Op. Att'y Gen. 457, 458 (1936) (citing as authority four Supreme Court cases).

[48] Consider, for example, the decision in *Ex parte Gilchrist* that President Jefferson could not direct the Secretary of the Treasury to instruct customs collectors to detain *all* vessels under a statute authorizing the collectors to use their own discretion. But note that the rationale was that this was an increased "constraint on *commerce*," a power expressly given to Congress by article I, Section 8, clause 3, of the Constitution. See E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 418-19 n.56 (1984). See also, *id.* at 417 n.49.

power to "inspect and control the conduct of all subordinate executive officers."[49]

The fact that some statutes appear to vest discretionary authority in the Secretary of Defense rather than the President may appear to challenge this concept. A reasonable explanation--discussing the relationship between the Secretary of Defense and the service secretaries rather than the President, but applicable alike to both situations--was provided in a 27 March 1953 legal opinion *Re the Power and Authority of the Secretary of Defense* prepared by the General Counsel of the Department of Defense. It explained:

> The fact that statutes have been passed subsequent to the 1949 amendments to the National Security Act which statutes confer specific authorities on a Secretary of a particular military department or other subordinate officer of the Department does not detract from the supreme authority of the Secretary of Defense. Once supreme authority is established it need not be repeatedly mentioned.[50]

Addressing specifically the relationship between the Secretary of Defense and the President, the memorandum states: "No one at this date in our constitutional history would seriously advance the argument that because specific laws vest particular duties and responsibilities in the heads of executive departments, therefore the President does not have and cannot exercise supreme executive power over the entire fabric."[51]

The memorandum attempted to list the statutory constraints that existed in 1953 upon the "supreme power of the Secretary of Defense" as provided in the National Security Act. Summarized briefly, they provide:

- The Secretary may not exercise his power so as to transfer, reassign, abolish, or consolidate the combatant functions of the military services.
- The prohibition above also may not be done indirectly by detailing personnel or directing the expenditure of funds.
- The Secretary may not merge the three military departments, or deprive the service Secretaries of their legal right to administer their organizations "subject to his power and authority."
- The Secretary "cannot use his legal power to establish a single commander of all the Armed Forces; an operating military supreme command over the Armed Forces;

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[49] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 87 (1976).

[50] Memorandum on file at the Center for Law and National Security, University of Virginia School of Law. There is obviously a major difference between the relationship between the Secretary of Defense and the Service Secretaries, which (as the memo notes in the following sentence) could be modified by "a most specific and emphatic statement" by Congress, and his relationship with the President, whose power as Commander-in-Chief comes not from Congress but from the Constitution.

[51] *Id.* at 57.

or a supreme Armed Forces general staff." However, this restriction is qualified by the following explanation:

> The legislative history of the statute shows unmistakably that the prohibition "he shall not establish a military staff" was never intended by the Congress to operate as a limitation on the power of the Secretary of Defense to establish in his own office such staff units or agencies as he felt might be necessary to assist him in carrying out any responsibilities to him under law. The Secretary of Defense has full power, expressly granted in the law, to set up such units and to staff them with either civilian or military personnel as he chooses. Everyone familiar with the background and legislative history of the National Security Act knows just what Congress meant by the term "military staff." The general staff type of military control, as it existed in Germany, has been explained, defined, and attacked in Congress often enough. That form of military staff is completely different from the employment by the Secretary of assistants, either as individuals or grouped into organized units, to advise and assist him. There is no limitation upon the type of problem or subject matter which the Secretary may assign to such assistants or units.

- The Secretary may not "transfer, reassign, abolish, or consolidate" a "specific function" assigned by law "to another officer or organizational segment of the Department" without first reporting the intended action to the congressional Armed Services committees. As the memorandum notes: "This language clearly presupposes that the Secretary of Defense, as head of the Department of Defense, has the authority to transfer, reassign, abolish, or consolidate functions within the Department, as long as the Secretary does not violate one of the above specified limitations upon his general power."
- Although listed as "not really a limitation on the power of the Secretary," the final statutory provision has the potential for raising a serious constitutional issue. It provides that nothing in the statute shall be construed: "to prevent a Secretary of a military department or a member of the Joint Chiefs of Staff from presenting to the Congress, on his own initiative, after first so informing the Secretary of Defense, any recommendation relating to the Department of Defense that he may deem proper.' This provision needs no further elaboration."[52]

While this last provision, as a matter of policy, has much to commend it, it probably could not constitutionally be interpreted to authorize a military officer (or civilian defense official) to communicate information of a sensitive nature to the Congress against the wishes of the President. The doctrine of Executive Privilege, discussed in Section V, is derived from the separation of powers principle, and the decision concerning what sensitive information to provide to Congress rests in the first instance with the President. While the Court has hinted that there may be an "absolute" Executive Privilege with respect to sensitive military secrets, the full extent of the President's power to withhold such material from Congress has never been definitively resolved. In a conflict over this issue between Congress and the President, however, the Supreme Court is the appropriate authority to resolve the controversy. To the extent that statutes assuring congressional access to subordinate Department of Defense officials can be interpreted to conflict with this principle, they are probably invalid.

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[52] *Id.* at 56-57.

In addition to the legal constraints on executive branch reorganization of the Department of Defense, there are significant political considerations which should not be ignored. A detailed analysis of all such considerations is beyond the scope of this memorandum, but a useful analysis was provided in 1983 by Dr. Archie Barrett of the House Armed Services Committee. After proposing a series of reorganizational steps, Barrett concludes that most of them could be implemented internally by "[a] determined secretary of defense . . . ." He then writes:

> [T]he authority of both the secretary of defense and service secretaries appears to be sufficiently comprehensive to effect the integration of military department headquarters staffs. For example, the law specifies that the Air Force secretary, "as he considers appropriate, may assign, detail, and prescribe the duties of the members of the Air Force and civilian personnel of the Department of the Air Force." The assistant secretaries established by law could not be eliminated, and arrangements must assure that a civilian official, not his military deputy, assumes the authority of an assistant secretary when he is absent. . . .
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> Regardless of the technical feasibility of an in-house DOD reorganization, it would probably not be politically feasible--and even if it were, not politically advisable. These controversial measures do enjoy some support within the Department--and a great deal more could be marshalled, particularly at the outset of an administration, if service secretaries and other political appointees were selected who support limited reorganization. Nevertheless, the opposition to reorganization, centered in the military department secretariates and service staffs, would be formidable. And it would not hesitate to appeal for assistance to external supporters, particularly in Congress. Merited or not, the secretary of defense would be criticized for circumventing the spirit, if not the letter, of the National Security Act which provides that the chairman "may not exercise military command over . . . any of the armed forces. . . .
>
> Although recourse to Congress would subject the proposed reorganization to legislative tinkering and possible dilution, it would provide a number of advantages. Any sentiment that Congress was being

> circumvented would be avoided. Legislators who support the reorganization would be activated to overcome the opposition. If Congress accepted the reorganization on the basis of the strong case outlined later, the secretary would reinforce his political standing. The opposition of the services and their chiefs could be significantly muted if the proposed legislation included, in effect as a *quid pro quo*, recognition of their valid interest in the employment of military forces and the corresponding legitimacy of their role as warfare advisers. Finally, and most important, an open discussion of the organizational problems faced by a structure as complex as the Department of Defense would benefit the nation.[53]

Other political considerations include the perceived likelihood that, in reorganizing the Defense Department, the Congress would be disposed either to legislate in excessive detail--micro-managing and tying the President's hands as has happened with some frequency in the wake of the Vietnam experience[54]--or, alternatively, to grant the President and the Secretary of Defense additional flexibility to deal effectively with military crises in a complex and increasingly shrinking world. For example, burdensome legislative restrictions which are automatically suspended "in time of war" may have been more appropriate for the 1860's and even World War I than for a "come as you are" affair as any future major war is likely to be. There is little reason to assume that the President, once hostilities begin, would have time to restructure the defense establishment to deal with an enemy most effectively and carry out his constitutional duties as Commander-in-Chief. Even in the unlikely event that time permitted such a change, one must ask whether the initial stages of hostilities is the most appropriate time to structure the military force to fight.

The scale is probably tipped, however--at least in our view--by the realization that in the long-run military success is impossible without an effective partnership between the President and Congress. Each has responsibilities under the Constitution which can not, and should not, be shared with the other. But the full effort of both are required for success. Cutting Congress out of the "loop" in major defense reorganization runs a serious risk of antagonizing a crucial ally--and the related danger that Congress by legislation (perhaps in the form of amendments introduced under pressure from special interests, without the benefit of committee hearings and a comprehensive review under the guidance of the appropriate authorization committees), would undo all or parts of the reorganization scheme. Even more critically, it runs the risk of antagonizing an essential partner--which under the Constitution has primary responsibility for making "rules for the government" of the armed forces, and which is just recovering from a decade of distrust engendered by the tragic Vietnam experience.[55] These considerations seem weighty enough to establish a rebuttable presumption that significant reorganization of the Department of Defense ought to be a product of serious consultation and cooperation with the Congress, and ought to be undertaken by Executive regulation only with the clear approval of the Legislative branch.[56]

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[53] A. BARRETT, REAPPRAISING DEFENSE ORGANIZATION 279-80 (1983).

[54] An illustration of the dramatic increase in legislation affecting foreign affairs in the wake of Vietnam can be found by examining the congressional publication *Legislation on Foreign Relations* . The 1964 edition consisted of one volume of approximately 650 pages. Twenty years later, it had expanded to three volumes of more than 1,000 pages each. A review of the volumes will reflect that substantial legislation has been enacted having the effect of limiting the President's flexibility in areas of traditional congressional deference.

C. Alteration by Congressional Action: Authorities and Constraints

The powers of Congress to control the organization of Congress are expressly granted in the Constitution, and are limited only by that instrument. Other than the prohibition against abusing its own powers in such a way as to deprive the President of the command of the military, the limits are primarily political and prudential.

1. Authority for Alteration by Congress

The power of Congress to "raise and support armies," and to "provide and maintain a navy"[57]; combined with the power to "make rules for the government and regulation of the land and naval forces"; provide Congress with broad authority to prescribe the organizational structure of the military forces in great detail. While it is likely that the Founding Fathers *expected* Congress under normal circumstances to give the Commander-in-Chief a great deal of flexibility in structuring the forces at his command[58]--both by delegating to the President or the Secretary of War the initial authority to draft organizational proposals for consideration by Congress, and by permitting substantial discretion to organize or reorganize as necessary (particularly during periods of crisis) the existing military forces--it is equally clear that Congress was intended to have the *power* to exercise these authorities with great detail if it believed such an approach necessary to prevent Executive abuse. The decision on which approach to take was left entirely with Congress. While it is true that most of the early practice reflected great deference to the Executive,[59] on occasion Congress provided in significant detail for the organization of the army.[60]

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[55] We are not here suggesting that the congressional distrust over Vietnam was justified. On the contrary, we have argued on several occasions that Congress was a full partner in the commitment to Vietnam, and that legislative "responses" such as the 1973 War Powers Resolution were largely political expediencies aimed at avoiding responsibility for a failure that was in no small part a consequence of legislative decisions. See, e.g., R. TURNER, THE WAR POWERS RESOLUTION (1983); and Turner, *Congress and the Commitment to Vietnam*, in AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW & NATIONAL SECURITY, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 75-82 (1984).

[56] Especially the two Armed Services Committees.

[57] The power of Congress to "provide and maintain a navy" (U.S. CONST. art. I, sec. 8, cl. 13) has not been discussed thus far, because it is perceived as being similar in nature to the power to "raise and support armies." The original language in the draft Constitution gave power "to build and equip fleets," which was taken from the Articles of Confederation, and the change was made because the revised language was "a more convenient definition of the power." 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1789 at 330 (1966).

[58] Such decisions are best made on the basis of detailed knowledge of military science, intelligence on potential enemy strengths, and the like--information which not even the Senate, much less the full Congress, was expected to possess. See 3 THE WRITINGS OF THOMAS JEFFERSON 17 (A.Lipscomb & A. Bergh eds. 1903) ("The Senate is not supposed by the constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them, nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President." While Jefferson was discussing diplomatic rather than military affairs, the controlling principle would seem to be the same. The case that Congress was not expected to have access to the most sensitive diplomatic or military secrets--made in the convention debates, the state ratification debates, the *Federalist Papers*, and the early debates of Congress and the Executive--is overwhelming. See *supra* chapter five. See generally, A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER (1976).

Addressing the scope of the congressional power to raise armies, Clarence A. Berdahl gives a very broad--but not unreasonable--interpretation in *War Powers of the Executive in the United States*:

> Raising armies includes such matters as the determination of the number of men to be enlisted; their enlistment qualifications; their organization into the different arms of the service; the number and arrangement of the various units; the number and rank of officers; the term of service for officers and men. Providing a navy includes the determination of the same class of subjects relating to the seamen and naval officers; the number, size, character, and cost of vessels of war, navy and dock yards, and other similar matters.
>
> Over all of these matters the power of Congress is complete and exclusive. *The President is vested with no consitutional [power] in regard to the raising and organization of the armed forces.* He derives none from his position before international law. Hence such powers as he does possess in this respect must rest wholly upon the authority of custom and statute. Congress in this field is supreme, but Congress has from the first recognized the wisdom and necessity of entrusting the President with some statutory authority, which has at times amounted to the exercise of a considerable discretionary power. [Emphasis added.][61]

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[59] See *supra*, chapter five generally, and A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 271 (1976).

[60] See, e.g., *An Act for the better organizing, paying, and supplying the army of the United States*, 30 March 1814, 3 Stat. 113 (1814). (Providing, *inter alia*, that "each company shall consist of one captain, one first lieutenant, two second lieutenants, one third lieutenant, five serjeants, one quarter-master's serjeant, eight corporals, four musicians, and one hundred privates." *Id.* sec. 2. See also, A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 269 (1976).

[61] C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 101 (1921).

The Supreme Court, in challenges by private citizens to the power of Congress to legislate in this area, has noted that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[62]

Although Congress has tended to give the Secretary of Defense substantial discretion to organize the Department of Defense as he judges most effective to meet constitutional and statutory responsibilities, it has on occasion bowed to special interest pressures and imposed structural changes against the expressed desires of the Secretary. Dr. Barrett writes:

> The Secretary of Defense's own staff, OSD, has been regularly subjected to detailed legislative engineering. For example, Congress established the assistant secretary of defense for health affairs, ASD(HA), over the objections of Secretary of Defense Melvin Laird. A specific legislative charter assigned the ADS(HA) "overall supervision of health affairs in the Department of Defense." The continuing external interest in this position was demonstrated when Secretry of Defense Harold Brown attempted to reduce his span of control by directing that the ASD(HA) report to him through the assistant secretary of defense for manpower, reserve affairs, and logistics. Intense congressional opposition caused Secretary Brown to compromise by creating a dual reporting channel which guaranteed direct access to the secretary by the ASD(HA).[63]

To the extent, and for whatever reason, Congress establishes specific assistant secretary positions, these may not under most circumstances[64] be altered by the President or the Secretary of Defense without congressional authorization.

Although the appointment power is given to the Executive--subject as provided in the Constitution or by statute to Senate "advice and consent"--it is constrained by the power of the Congress to create offices. Chief Justice Marshall said while on circuit in *United States v. Maurice*: "It is too clear, I think, for controversy, that appointments to office can be made by heads of department, in those cases only which congress has authorized by law."[65]

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[62] *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (Power of Congress to prohibit draft card burning upheld.). See also, *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942); and *Lichter v. United States*, 334 U.S. 742, 755-56 (1948).

[63] A. BARRETT, REAPPRAISING DEFENSE ORGANIZATION 28 (1983).

[64] It is uncertain whether the President would have the authority to modify such a position during wartime (assuming for the moment that no provision existed to give legislative authority for such a modification).

[65] *United States v. Maurice*, 26 Fed. Cas. 1211, 1216, Case No. 15,747 (C.C. D.Va. 1823)(Marshall, Circuit Justice).

Congress has, for example, the power "to fix the relative rank of the line and civil or staff officers of the navy . . . .[66]" In reaching this conclusion, Attorney General Edward Bates wrote in 1862:

> The Constitution vests the executive power in the President and makes him the Commander-in-Chief of the Army and Navy of the United States. But it reposes in Congress the power "to raise and support armies," "to provide and maintain a navy" and "to make rules for the government of the land and naval forces." And this is in harmony with our system of government, under which executive and legislative powers are carefully distinguished and separated, the President being the repository of the one class and Congress of the other.
>
> If, therefore, to fix the relative rank of the line and civil or staff officers of the navy be an act of legislative power, it belongs to Congress, and not to the President as the Executive.
>
> In my opinion, it is an act essentially legislative. It is the establishment of a "rule for the government of the navy," of precisely the same kind as the establishment of grades or rank in the line. It is designed to fix permanently the rank and grade of a class of officers of the navy by virtue whereof they acquire certain rights. Whether these rights be of increased rank or of increased pay can make no difference in principle. The act is in no just sense an exercise of Executive power, for it is the *prescription* of a rule and not the *execution* of a rule already prescribed.[67]

From the earliest days of our history the Congress has claimed the power to require that promotions--at least at the lower ranks[68]--be made on the basis of seniority.[69]

In addition, Congress has the power to set qualifications for the offices it establishes, and this further constrains the President's discretion under his appointment powers. Professor Corwin writes:

> One power of supreme military command the President curiously lacks: that of choosing his subordinates. Not only does Congress determine the grades to which appointments may be made and lay down the qualifications of appointees, but it has always been assumed that the Senate shares the appointing power for military as well as civil officers. Without

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[66] 10 Op. Att'y Gen. 413, 414 (1861).

[67] *Id.* at 414.

[68] E.g., an act of 3 March 1869 provided that "vacancies in established regiments and corps to the rank of colonel were required to be filled by promotion according to seniority, except in case of disability or other incompetency. . . . Appointments above the rank of colonel were made by selection." 13 *id.* 13-15 (1869).

[69] *Id.* In a letter to General Armstrong in February 1813, former President Jefferson lamented "[t]he unfortunate obstinacy of the Senate in preferring the greatest blockhead to the greatest military genius, if one day longer in commission . . . ." THE JEFFERSONIAN CYCLOPEDIA 54 (J. Foley ed. 1900).

doubt Congress could transfer the power to "the President alone," but has never done so. Indeed, it has at times attempted to usurp the appointing power itself.[70]

Professor Willoughby adds:

> It is clear that, when Congress prescribes the qualifications that must be possessed by persons who are to be nominated for office by the President, the President's discretionary right to make such nominations is, to such extent, circumscribed. However, practice, which has been acquiesced in since the beginning of the Government, has established the doctrine that such qualifications may be prescribed provided they are not so minute and special as, in effect, to leave to the President no real freedom of choice and to narrow the possible nominees down to particular individuals and thus make them, in effect, the nominees of Congress itself.[71]

Congress also has the power, "subsumed under the power of creation,"[72] to alter the powers of existing legislatively created offices. Professor Corwin explains:

> Another power of Congress which must be distinguished from the appointing power is that of determining the powers and duties of officers of the United States. In the case of an existing office Congress may increase these to an indefinite extent without necessitating a reappointment to the office [citation omitted]; but it seems to be the Court's opinion and is certainly a very logical one, that new duties should be "germane" to the existing office, and especially that their assignment should not transgress the principle of the separation of powers.[73]

No discussion of congressional powers to control or influence the organization of the Department of Defense would be complete without at least touching on the so-called

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[70] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1789-1984 at 296 (1984). Instances of attempted usurpation are considered *infra*. See also E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 75-77 (1976).

[71] W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 630 (2d ed. 1934). Willoughby expresses surprise that "the constitutionality of this congressional practice" has not been adjudicated. *Id.*

[72] Note, *Reorganization of the Executive Branch,* 58 COL. L. REV. 1211, 1220 (1948). This note states that the President "may neither create offices *nor alter the structure of the executive branch without authorization by Congress.* [Emphasis added.]" *Id.*

[73] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 78 (1976). The Supreme Court in *Kendall v. United States* held that "it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President." Quoted in E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 100 (1984).

"power of the purse"--not in the sense of Congress's ability to deny the President any army to "organize" by refusing to appropriate money for its support, but in the sense that the ultimate control over the purse[74] might permit Congress to place "conditions" on expenditures which achieve results beyond those permitted to Congress by other provisions of the Constitution--and the "necessary and proper" clause of the Constitution.[75] A thorough discussion of either issue is beyond the scope of this memorandum,[76] but some general comments may be useful.

Put simply, the control of appropriations does not vest in Congress any power to constrain the President as Commander-in-Chief that it does not otherwise possess through the substantive grants of Article one, Section eight, of the Constitution. Congress already has complete control over the existence of military forces under those provisions. But Congress may not, in creating an Army, condition appropriations in such a way as to usurp powers given the President by the Constitution. Congress could not, for example, in appropriating funds for the operation of the Department of Defense, add a stipulation providing that none of the funds could be expended unless the President replaced the incumbent with a different named individual to be Secretary of Defense. Nor could it provide that funds would cease to be available unless a particular military unit were used in a designated manner during hostilities. The appointment and command functions are vested in the President by the Constitution, and may not be either directly or indirectly exercised by Congress. As the Supreme Court said in *Fairbank v. United States*, "what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result."[77] Both the Supreme Court[78] and Attorneys General[79] have taken this position, and its logic is completely persuasive. The entire system of separation of powers would be defeated if Congress, by simply making the availability of funds contingent upon the occurrence or non-occurrence of certain acts, could direct the conduct of the other independent branches of government. Such a theory, for example, would permit the Congress to deprive the Court of its power of judicial review simply by providing in Court appropriations legislation that funding would be terminated if the Court held any of a specified enumeration of bills to be unconstitutional.

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[74] U.S. CONST. art. I, sec. 9, cl. 6 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law . . . .")

[75] *Id.* sec. 8, cl. 18 (Congress shall have power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this consitution in the government of the United States, or in any department or officer thereof.") This provision is discussed *supra*.

[76] Both issues are dealt with at some length in a forthcoming study, R. TURNER, CONGRESS, THE CONSITUTION, AND FOREIGN AFFAIRS, which will be published shortly by the University Press of Virginia.

[77] *Fairbank v. United States*, 181 U.S. 283, 294 (1901). See also, *United States v. Butler*, 297 U.S. 1, 68-69 (1936) ("It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.")

[78] The attempt of the Congress to use its control over judicial jurisdiction to control the President's Pardon power (*Klein v. United States*) is discussed *supra*, chapter V. During World War II, an effort by Congress to condition appropriations to block the payment of salaries to three named government employees (in the form of a prohibited "bill of attainder") was struck down by the Supreme Court in *United States v. Lovett*, 328 U.S. 303 (1946), despite a claim by congressional counsel that the power over appropriations was plenary and unreviewable.

[79] See, e.g., 41 Op. Att'y Gen. 230-33; *id.* at 514-21.

Professor Henkin, in *Foreign Affairs and the Constitution,* has observed: "Congress has attempted to influence the conduct of the President, and of other governments, by imposing 'conditions,' especially on spending and appropriations." He concludes:

> Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. So, should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation, as he has "riders" purporting to instruct delegations to international conferences.[80]

Similarly, although the "necessary and proper" clause gives "a virtual plenary power . . . over the structure of the executive branch,"[81] it does not authorize Congress to act in any manner "inconsistent with the letter and spirit of the constitution."[82] This, too, is beyond serious question.

2. Legal and Political Constraints on Alteration by Congressional Action

Despite the broad powers possessed by Congress to control the organization of the Department of Defense, it is essential to keep in mind that there are important limitations on this authority. In a study published a century ago, Professor John Norton Pomeroy set forth the basic theory of separation of legislative and executive powers under the American Constitution:

> It should be carefully borne in mind that the President is an independent, co-ordinate department of the government. The grand theory of the Constitution makes him a co-equal in the tri-partite organization. He draws his power from the same source as the national legislature and judiciary; he is answerable to neither; his discretion is as absolute as that of any legislator, and more so than that of any judge; no other branch of the

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[80] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 113 (1972).

[81] Note, *Reorganization of the Executive Branch*, 58 COL. L. REV. 1211, 1220 (1948). With specific reference to this clause and congressional powers in wartime, see *Lichter v. United States*, 334 U.S. 742, 781 (1948).

[82] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

> government may rightfully interfer with him in the exercise of that discretion.[83]

Perhaps most importantly, in practice this means that the Congress must not infringe upon the President's power to *command* whatever military forces exist. As the Court of Claims said in the case of *Swaim v. United States*:

> Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress cannot take away from the President the supreme command. . . . *Congress cannot in the disguise of "rules for the government" of the Army impair the authority of the President as Commander in Chief.* [Emphasis added.][84]

Similarly, concurring in *Ex parte Milligan*, Chief Justice Chase (joined by three other members of the Court) wrote:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns.* That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. [Emphasis added.][85]

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[83] J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 534 (1886). See also, *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838)

[84] 28 Ct. Cl. 173, *aff'd* 165 U.S. 553 (1897).

[85] 71 U.S. (4 Wall.) 139 (1866). See also sources cited in R. TURNER, THE WAR POWERS RESOLUTION 43-44 n.101 (1983). But see Justice Jackson's concurring opinion (joined by no other member of the Court, but other portions of which are frequently cited with favor) in *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure Case) 343 U.S. 579 (1952): "While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions." *Id.* at 644.

Above all, for our purposes, this means that Congress can not directly interfere with the President's function as Commander-in-Chief, either by attempting to vest the power in another individual or entity[86] or by trying to remove military forces from the President's control.[87] In the landmark case of *Martin v. Hunter's Lessee*, the Supreme Court in 1816 noted that: "The second article declares that 'the executive power *shall be vested* in a president of the United States of America.' Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. [Emphasis in original.]"[88] The same rule clearly applies to the Commander-in-Chief power. The only authority that can properly separate the ultimate power of Commander-in-Chief from the presidency is the American people through the procedures established for amending the Constitution. As Attorney General Cushing observed in 1855: "No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President."[89]

History suggests that the Congress has been most disposed to infringe upon the President's Commander-in-Chief powers during periods following major hostilities during which Commanders-in-Chief had been accused of overstepping their authority, and the prestige of the incumbent President was low.[90] We have in mind particularly the anti-Johnson period of Civil War Reconstruction in the late 1860's, and the anti-Nixon "Watergate" period which followed America's loss in Vietnam; but there are other examples that fit at least part of this mold.[91]

A series of unprecedented legislative acts were passed--many over Executive vetoes--in the years following the Civil War in an attempt to limit the independence of the

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[86] "[I]n the carrying on of war as Commander-in-Chief, it is he [the President] who is to determine the movements of the army and of the navy. Congress could not take away from him that discretion and place it beyond his control in any of his subordinates, nor could they themselves, as the people of Athens attempted to, carry on campaigns by votes in the market-place." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 129 (1916). See also, E. CORWIN, THE PRESIDENT; OFFICE AND POWERS, 1787-1984 at 263 (1984).

[87] See, e.g., J. ROGERS, WORLD POLICING AND THE CONSTITUTION 88-89 (1945); W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 126 (1916) ("Two principles, limiting Congressional inteference with the Executive powers, are clear. First, Congress may not exercise any of the powers vested in the President, and second, it may not prevent or obstruct the use of means given him by the Constitution for the exercise of those powers."); J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 588-91 (1866); Taft, *The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government*, 25 YALE L. J. 605, 606, 610, 611-12 (1916) ("Congress may not usurp the functions of the Executive . . . by forbidding or directing the movement of the army and navy. . . . When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.").

[88] 14 U.S. (1 Wheat.) 304, 329-30 (1816).

[89] 7 Op. Att'y Gen. 465 (1855).

[90] This last characteristic may be coincidental, although certainly it was a factor in the post-Vietnam confrontations.

[91] Among his other criticisms of the proposed Senate amendments to the Treaty of Versailles, Professor Quincy Wright argued that some of them may have infringed upon the President's constitutional power "to direct the movement of troops." Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 119 (1922).

President *vis-à-vis* Congress. President Andrew Johnson and the Republican-controlled Congress were openly feuding over Reconstruction policy, and Congress sought allies within the Executive branch to insure that its policies prevailed. Several statutes limited the President's authority to dismiss subordinates without the consent of the Senate,[92] and included within this category was legislation to deny the President his previously recognized power to dismiss military officers without the consent of the Senate.[93] In discussing the section of the act of 17 July 1866 denying the President's removal power, the Supreme Court in *Blake v. United States* provided useful background to the era:

> That section originated in the Senate as an amendment of the army appropriation bill . . . . It is supposed to have been suggested by the serious differences existing, or which were apprehended, between the legislative and executive branches of the government in reference to the enforcement, in the States lately in rebellion, of the reconstruction acts of Congress. Most, if not all, of the senior officers of the army enjoyed, as we may know from the public history of that period, the confidence of the political organization [the Republican Party] then controlling the legislative branch of the government. It was believed that, within the limits of the authority conferred by statute, they would carry out the policy of Congress, as indicated in the reconstruction acts, and suppress all attempts to treat them as unconstitutional and void, or to overthrow them by force[.] Hence, by way of preparing for the conflict then apprehended between the executive and legislative departments as to the enforcement of those acts, Congress, by the fifth section of the Act of July 13, 1866, repealed not only the seventeenth section of the act of July 17, 1862 [authorizing the President to dismiss officers without Senate approval], but also the resolution of April 4, 1862, which authorized the President, whenever military operations required the presence of two or more officers of the same grade, in the same field or department, to assign the command without regard to seniority of rank.[94]

The following year, as relations with the Johnson Administration continued to deteriorate, the Congress went even further in legislatively attempting to restrict the President's authority as Commander-in-Chief, increasing in the process the independence of General Grant. An act of 2 March 1867 provided in part:

> SEC. 2. *And be it further enacted*, That the head-quarters of the General of the army of the United States shall be at the city of Washington,

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[92] The most dramatic statute--the Tenure in Office Act--led to the impeachment and almost to the conviction of President Johnson.

[93] See *supra*, Section V.

[94] *Blake v. United States*, 103 U.S. 227, 235-36 (1880). The Court was able to dispose of the case without ruling on the constitutionality of the challenged statute.

> and all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the army, and, in case of his inability, through the next in rank. The General of the army shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said head-quarters, except at his own request, without the previous approval of the Senate; and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdomeanor in office; and any officer of the army who shall transmit, convey, or obey any orders of instructions so issued contrary to the provisions of this section, knowing that such orders were so issued, shall be liable to imprisonment for not less than two nor more than twenty years, upon conviction thereof, in any court of competent jurisdiction.[95]

When this provision was before the Senate in February 1867, an effort was made to delete it on the grounds that it was unconstitutional. An excerpt from the *Congressional Globe* is instructive:

> Mr. JOHNSON. . . . [I]t seems to me perfectly obvious that that section is in direct conflict with the Constitution of the United States. The Constitution, in express terms, not content with placing the entire executive power of the nation in the executive department of the Government and in the President of the United States as the head of that department, provides that he shall be the Commander-in-Chief of the Army. And this section says, although in the absence of such a provision General Grant would be under the control of the President as the constitutional Commander-in-Chief, his station shall be here though that commander may think it should be elsewhere. And it goes on further and says that no orders shall be issued of a military character except in accordance with the provisions of this bill; and proposes to punish any officer of the Government who may dare in the face of Congress to obey a military order coming from the constitutional Commander-in-Chief. . . .
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> Mr. McDOUGALL. I desire to say that I altogether agree with the Senator from Maryland, that this provision is in direct violation of the Constitution of the United States, and cannot be made law here. The virtue of the Executive is to be extracted and to be eliminated and to be exproduced, so that he shall have no power at all over the Army of the United States or its General. We have now in command of the armies a General who is subordinate by the Constitution to him, who by the Constitution is denominated Commander-in-Chief of the armies and navies

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[95] 14 Stat. 486-87 (1867).

> of the United States. This thing of triffling with great constitutional principles may seem well to some; it may be within the range of the capacity of Senators to feel well when they undertake to usurp authority forbidden by the Constitution; but it is not so with me. . . . [T]his is a gross attempt at a violation of the Constitution.[96]

Nevertheless, the President's critics had the votes, and the provision was enacted into law. Upon becoming President, General Grant also objected to this statute on constitutional grounds, and it was shortly thereafter repealed. Commenting on the unconstitutionality[97] of this bill a few years later, Professor Pomeroy observed: "If Congress may do this in respect to one officer high in rank, it may do it in respect of all officers, and the private soldiers, and may thus assume to itself the entire attributes of Commander-in-Chief."[98]

Another noteworthy congressional proposal to interfere with the powers of the Commander-in-Chief occurred during World War I, when the House Committee on Military Affairs became frustrated over what it perceived to be the inefficiency and duplication of functions within the Department of War. On behalf of the Committee, Representative Chamberlain reported a bill to the House floor on 21 January 1918 which would have established a "war cabinet" of three "distinguished citizens" appointed by the President with the advice and consent of the Senate. This body would possess, *inter alia*, the following powers:

> Sec. 2. That said war cabinet shall have jurisdiction and authority as follows:
> (a) To consider, devise, and formulate plans and policies, general and special, for the effectual conduct and vigorous prosecution of the existing war, and, in the manner hereinafter prescribed, to direct and procure the execution of the same,
> (b) To supervise, coordinate, direct, and control the functions and activities of all executive departments, officials, and agencies of the Government in so far as, in the judgment of the war cabinet, it may be necessary or advisable so to do for the effectual conduct and vigorous prosecution of the existing war.
> (c) To consider and determine, upon its own motion or upon submission to it, subject to review by the President, all differences and questions relating to the conduct and prosecution of the war that may arise between any such departments, officials, and agencies of the Government . . . .[99]

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[96] 37 CONG. GLOBE 1851 (pt. 3, 1867).

[97] E.g., Professor Corwin terms this rider "unquestionably unconstitutional . . . ." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 at 463 n.89 (1957).

[98] J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 471 (1886). See also, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 350 n.42 (1972).

[99] 56 CONG. REC. 1077 (1918).

Clarence A. Berdahl, in his *War Powers of the Executive in the United States*, provides analysis and additional background on this legislative proposal:

> The bill thus proposed to confer powers under which this new war cabinet, as one Senator said, "could take absolute charge of the conduct of the war. The President would not have the authority to initiate or formulate any plans or policies for its prosecution. His power as Commander-in-Chief would be destroyed. He would be subject to the orders of the War Cabinet." President Wilson therefore vigorously opposed this proposal, saying that it "would involve long additional delays and turn our experience into mere lost motion," and instead he secured the introduction, and finally the passage, of a bill containing his ideas for meeting the situation.
>
> This so-called Overman Act authorized the President "for the national security and defense, for the successful prosecution of the war, for the better utilization of resources and industries, and for the more effective administration by the President of his powers as Commander-in-Chief of the land and naval forces," to make such redistribution of functions among the executive agencies as he might deem necessary, to utilize, coordinate, or consolidate any existing executive or administrative agencies; to transfer any duties or powers, together with any portion of the personnel and equipment, from one such agency to another; and to make whatever regulations and issue whatever orders might be necessary to carry out these provisions. The President was further authorized to establish an executive agency for exercising such control over the production of aeroplanes and aircraft equipment as he might consider advantageous. He had no power, however, to abolish any bureau or eliminate its functions altogether, but was authorized to make such recommendations to Congress in that regard as he might deem proper. . . .
>
> The President was thus, by the terms of this act, given complete control over the administrative machinery of the nation as used for the purposes of the war.[100]

Berdahl notes that the act was criticized as "a dangerous extension of the President's power," but that "at least one distinguished authority"--former Secretary of State and Attorney General Philander C. Knox--"held that it was entirely unnecessary, claiming that the President already had full constitutional power to make such transfers of functions and consolidations of agencies on his own initiative." Knox continues:

> I think, the President has the authority to require every executive officer and every department of the Government to do anything that he directs to be done in order to prosecute this war to a successful conclusion. I think he

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[100] C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 174-75 (1921).

> has the power to delegate from one Cabinet officer to another the discharge of any particular duty that he thinks such a Cabinet officer can discharge better than the one upon whom it would normally be incumbent. I do certainly think that the President has all those powers. . . . As I have read the Overman bill, in so far as it proposes to authorize the President to utilize and coordinate executive agencies, . . . I would not hesitate a second to advise the President of the United States that he now possesses that power.[101]

Most recently, as a result of dissatisfaction over presidential handling of the Vietnam war, Congress again in our view[102] encroached upon the Commander-in-Chief power. For example, although--despite a growing conventional wisdom to the contrary--Congress had fulfilled its constitutional role by formally authorizing the President to use armed force in defending the people of Indochina,[103] as the war became a political liability around 1969 or 1970, members of Congress sought to disassociate themselves from the

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[101] Quoted in *id.* at 175.

[102] Both authors have written extensively on this subject. See, e.g., R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); J. MOORE, LAW AND THE INDO-CHINA WAR (1972); Moore, "Rethinking the War Powers Gambit," *Wall Street Journal*, 27 Oct. 1983; and contributions by both authors in AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY (1984).

[103] A full discussion of the congressional role in committing United States combat forces to Vietnam is beyond the scope of this memorandum, however a brief summary may be helpful. The Supreme Court upheld the use of joint resolutions of Congress in authorizing hostilities as early as 1800 (see *supra*, Section V), and in 1967 the Senate Foreign Relations Committee reported: "The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to . . . the Gulf of Tonkin are a proper method of granting authority." (Quoted in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 333 n.61 [1972]) Section 2 of the 1964 Tonkin Gulf Resolution (78 Stat. 384) provided that, in accordance with its obligations under the SEATO Treaty, the United States was prepared "as the President determines, to take all necessary steps, including the use of armed force," to assist the nations covered by the SEATO Treaty (including non-communist Indochina) defend their freedom. During Senate debate on the resolution, Senator John Sherman Cooper asked whether, "if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?," and was told by Chairman Fulbright--the floor manager and spokesman for the resolution--"That is the way I would interpret it." (110 CONG. REC. 18409 [1964]). In 1966 Senator Javits--who later introduced the War Powers Resolution--said "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy." (112 *id.* at 4374); and in 1970, Senator Sam Ervin said the Tonkin resolution was "a declaration of war in a constitutional sense . . . ." (116 *id.* at 15926). Professor Henkin is certainly correct when he writes: "[I]t is difficult to fault on constitutional grounds the Presidents who began to support South Vietnam by various forms of aid short of war. Even with sad hindsight . . . one cannot make a case that the Presidents usurped Congressional authority, especially since those early measures too, in fact, had the approval of Congress. . . ." After noting that once the conflict became a "war" the President needed to have congressional authorization, Henkin concludes: "For constitutional purposes it seems indisputable that he did, in the 'Tonkin Resolution,' in repeated Congressional appropriations, [etc.] . . . . That, as some later claimed, Congress did not appreciate what it was doing, or that its hand was forced to do it, is constitutionally immaterial." L. HENKIN, THE CONSTITUTION AND FOREIGN AFFAIRS 101 (1972).

Commander-in-Chief's conduct of the war.[104] This led in 1970 to passage of a statute seeking to use the "power of the purse" to prohibit the deployment of U.S. combat troops into Cambodia. In opposing this statute, Senator Sam Ervin--widely regarded as perhaps the Senate's foremost constitutional scholar of the period[105]--asserted:

> I wish to say something about charges which have been made and are being made to the effect that President Johnson and President Nixon have exceeded their constitutional powers in some of the military operations they have undertaken in Southeast Asia. This necessitates a consideration of relevant consitutional provisions . . . . The question which arises in respect of the war powers of the United States is this: Who is to direct the tactical operations of the military forces of the United States when a war is being fought? As I analyze the Church-Cooper amendment it asserts, in effect, that the Congress has some power to direct the actual operations in war of American troops in the theater of operations.
>
> Mr. President, I submit that the Founding Fathers were not foolish enough to place the command of American troops engaged in combat operation in a Congress of the United States which is now composed of 100 Senators and 435 Representatives. I cannot imagine anything that would more nearly resemble bedlam than to have a council of war composed of 100 Senators and 435 Representatives to determine where the enemy is to be attacked or how the defeat of the enemy is going to be undertaken, or how to protect American forces from destruction by the armed enemy. . . .
>
> I have high admiration and deep affection for those who are proponents of the Church-Cooper amendment, but I cannot escape the abiding conviction that this amendment, if adopted, would represent an attempt upon the part of the Congress of the United States to usurp and exercise, in part at least, the constitutional powers of the President of the United States as the Commander in Chief of our Army and Navy. . . . I think that the Church-Cooper amendment is unconstitutional, in that it attempts to have Congress usurp and exercise some of the powers to direct the military forces in the theater of operations which belong, under the Constitution, to the President of the United States.[106]

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[104] It is worth noting that, until the late 1960s, the Vietnam commitment had the overwhelming support of the Congress. For example, in 1966 when there were hundreds of thousands of combat soldiers fighting in Vietnam, a $13 billion supplemental appropriations bill for the war passed the House 389 to 3, and the Senate 87 to 2. (Pub. L. 89-375.) In 1967, a $12 billion supplemental Vietnam appropriation passed 385 to 11 in the House, and 77 to 3 in the Senate. (Pub.L. 90-8.)

[105] Even Senator Fulbright, a strong critic of U.S. policy in Vietnam, referred to Senator Ervin as "a distinguished jurist, the most distinguished in the Senate . . . ." 116 CONG. REC. 40313 (1970). Senator Charles Percy, who later served as chairman of the Committee on Foreign Relations, described Senator Ervin as "one of the Nation's leading constitutional authorities . . . ." 120 *id.* 41740 (1974).

[106] 116 *id.* 15924-25, 15927 (1970).

This was not the only infringement of the Commander-in-Chief power as a consequence of dissatisfaction with the Vietnam war (and also taking advantage of the weakened presidency as a consequence of public outrage over the "Watergate" affair). Congress also enacted--over a presidential veto--the 1973 War Powers Resolution.[107] Among its other constitutional problems,[108] this statute attempted to limit the President's use of military force to three specified situations--omitting, among other things, his power to rescue American citizens endangered abroad.[109] It also requires the President to withdraw forces deployed in other countries if there is an "imminent" likelihood of "hostilities"--after a period of 60 days[110] unless Congress affirmatively authorizes their continued deployment.[111] This applies even if no shots have been fired, and the forces are deployed at the request of the State in question and with the formal approval of every other State in a position to do them harm. Whatever one may think of the wisdom behind the decision to deploy U.S. Marines to Lebanon in 1982 and 1983, it can hardly be contended that their presence deprived Congress of its proper role in authorizing "war." If Congress may by simple statute deprive the President of his Commander-in-Chief discretion when a deployment runs the risk that terrorists might initiate attacks against U.S. forces, this weakens the constitutional authority of the President almost as much as it strengthens the hand of international terrorism. Put simply, the Commander-in-Chief power may not be constrained by statute--and it certainly may not be limited (as this provision pretends to do) by congressional *silence*.[112]

The Commander-in-Chief power similarly puts limits on Congress's authority to organize the military forces it creates, although in this area--unlike in connection with troop deployment decisions--Congress does have very broad powers. The general power to organize the military is vested in Congress, subject only to the limitation that it not be exercised in a manner contrary to the spirit or letter of the Constitution. At minimum, for example, as already discussed the Congress can not establish a military chain of command that does not have the President at its top.[113] In considering other limits in this area, it is useful to examine the constitutional purposes behind the relative military powers of Congress and the President.

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[107] 87 Stat. 555 (1973).

[108] E.g., Section 5(c) provides that Congress may by simple majority vote of each house "veto" a deployment of troops into a situation in which involvement in hostilities is "clearly indicated by the circumstances"--regardless of whether or not the deployment has any connection with a "war"--without presenting the resolution to the President. The failure to comply with the presentment clause of the Constitution in an immigration statute was struck down as unconstitutional in *I.N.S. v. Chadha* (discussed *infra*), and by implication the "legislative veto" in the War Powers Resolution fell with it.

[109] Sec. 2(c). This would, among other things, have required formal congressional authorization before President Ford could have rescued the crew of the *S.S. Mayaguez* in May 1975, and before President Carter attempted the rescue of American diplomats in Iran.

[110] Technically the President may keep the troops in place for 62 days, and may extend that period another 30 days if necessary for their protection during evacuation.

[111] Sec. 5(b).

[112] For a more detailed discussion of the constitutional difficulties with the 1973 War Powers Resolution, see R. TURNER, THE WAR POWERS RESOLUTION (1983).

[113] In addition to sources already discussed, see P. WALLACE, MILITARY COMMAND AUTHORITY: CONSTITUTION, STATUTORY, AND REGULATORY BASES 22-23 (1983).

Ignoring for a moment the political or pragmatic considerations which have generally led Congress to delegate to the President substantial discretion in organizing *both* the "operational" and the "administrative" hierarchies of the military establishment, it is important to distinguish between these two functions. Congress possesses a great deal more constitutional authority to regulate the "administrative" defense structure--by which is meant such things as the establishment of offices, the acquisition of equipment and weapons,[114] the recruitment of personnel, and similar functions not directly involved in (but obviously related to) the actual employment of the military force--than it does the "operational" chain of command.

It is helpful in this regard to think of Congress as having, first of all, a "veto" on both the existence of the military force (and its individual components), and on the decision to use that force to initiate a "war." Both of these checks were adopted by the Founding Fathers at least in part to guard against Executive abuse of the Commander-in-Chief function. Control over the size and composition of the military serves in addition the important function of resource allocation. After considering the President's requests for appropriations, Congress was to have the final authority to evaluate--as the representative body of the taxpayers--what level of funding was desirable for federal expenditures; and more specifically what portion of that sum should be devoted to defense expenditures. It was almost certainly not expected that Congress would establish large staffs of experts to second-guess the professional judgments of the Commander-in-Chief and his military and civilian advisers, but the power to regulate procurement and other "non-command" decisions is sufficiently broad to support a significant amount of "micro-management" should Congress in its wisdom select such an approach.[115]

Beyond this, the power of Congress to control the manner in which the President uses the forces placed at his command to deter aggression, and to prepare for and conduct hostilities in the event deterrence fails, are more limited. A recent study by Raymond J. Celada, of the American Law Division of the Library of Congress's Congressional Research Service (CRS), observed: "Although in establishing positions and grades Congress effectively fixes the line followed when the President transmits battle and other orders, legislative efforts to limit absolutely the exercise of command authority to a single mode or channel raises both constitutional and practical problems."[116] To its credit,

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[114] However, it is worth noting that Congressman Gerald Ford objected in 1962 to language in a Defense Authorization Bill which would have "directed, ordered, mandated, and required" the President to build the RS-70 airplane, on the grounds that it would be "an unconstitutional invasion of the responsibilities of the Chief Executive" and would have invaded the proper jurisdiction of the Commander-in-Chief. The language was subsequently changed to "authorize" the President to build the airplane. Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid*, 1970 DUKE L. J. 293, 322-24 (1970).

[115] The problems of congressional micro-management of Defense programs are serious, but they are largely political and pragmatic rather than constitutional. They are also beyond the scope of this memorandum.

[116] Celada, *The Military Chain of Command*, in Staff Report to the Committee on Armed Services, U.S. Senate, DEFENSE ORGANIZATION: THE NEED FOR CHANGE 371, 374 (99th Cong. 1st Sess. Sen. Print. 99-86, 16 October 1985).

Congress has generally recognized this and allowed the President to exercise the discretion he is granted in the Constitution in structuring the actual channels of operational command. Even statutes which seem to depart from this principle are often a consequence of legislative requests by the President.[117]

In *Federalist* No. 72, Alexander Hamilton--in describing the "administrative" functions of the President under the proposed new Constitution--said that "*the arrangement of the army and navy,* the direction of the operations of war, these and other matters of a like nature constitute what seems to be most properly understood by the administration of government. [Emphasis added.]"[118] Similarly, in *An Introduction to the Constitutional Law of the United States*, Professor John Norton Pomeroy gives this explanation of the legislative power to "make rules for the government and regulation of the land and naval forces":

> The language of this clause should be carefully observed. Congress may make rules, the object of which shall be regulation and government. It cannot utter exceptional, or transitory mandates *which affect the management* and disposition of the army and the navy. This particular grant of power confers no authority upon the legislature to usurp the functions of the commander-in-chief. [Emphasis added.][119]

While in the absence of judicial authority it is difficult, if not impossible, to draw precise parameters around these conflicting powers, for both constitutional and pragmatic reasons the Congress ought to exercise caution in attempting by statute to constrain the President in the design of the operational chain of military command. Similarly, other defense functions--such as strategic planning[120]--are so closely related to the Commander-in-Chief function[121] that Congress should exercise restraint in any efforts to significantly restrict them--even with the approval, or *at the request of* an incumbent President.[122] To the extent that a statute in this area clearly infringed upon the President's constitutional authority, it would be *legally* [123] void.[124]

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[117] However, it is important to keep in mind that statutes normally continue beyond the incumbency of a sitting President, and thus should not be written--even if so requested by the Executive--to constrain the discretion of future Presidents.

[118] THE FEDERALIST No. 72 at 487 (J. Cooke ed. 1961)(A. Hamilton).

[119] J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 385 (1886).

[120] On 3 April 1958, President Eisenhower told Congress: "No military task is of greater importance than the development of strategic plans which relate our revolutionary new weapons and force deployments to national security objectives. Genuine unity is indispensable at this starting point. No amount of subsequent coordination can eliminate duplication or doctrinal conflicts which are intruded into the first shaping of military programs." Special Message to the Congress on Reorganization of the Defense Establishment.

[121] It is also worth noting that these functions are essentially unrelated to the primary legislative functions involving national defense: deciding upon whether to initiate a war, checking executive abuse, and resource allocation.

[122] An incumbent President lacks power either to voluntarily surrender a constitutional power entrusted to his office--although he obviously might make a non-binding "gentleman's agreement" with Congress not to *exercise* a particular power--or to deprive his successors in office of these powers. Statutes are an inappropriate vehicle for such political accomodations.

There are a number of statutes which seek to guarantee Congress access to senior civilian and military officials within the Department of Defense--provisions which President Eisenhower characterized as "legal insubordination."[125] Congress has substantial responsibilities pertaining to the Department of Defense, and as a matter of sound policy it is wise for the leaders of that department to assist Congress in understanding the Department and effectively carrying out legislative responsibilities with respect thereto. For Congress to wish to insure its access to information pertaining to its own constitutional responsibilities is not only unremarkable, it is admirable. But it is important to recognize that senior Department of Defense officials--and, indeed, some junior officials--will in the course of their responsibilities have access to highly sensitive operational information that the Founding Fathers did not intend to be shared with the legislative branch.[126] As Senator John Coit Spooner--a three term Senate veteran and "one of the best constitutional lawyers of his time"[127]--said in a 1906 floor debate:

> There are other cases, not especially confined, Mr. President, to the State Department, or to foreign relations, where the President would be at liberty obviously to decline to transmit information to Congress or to either House of Congress. Of course, in time of war, the President being Commander in Chief of the Army and Navy, could not, and the War Department or the Navy Department could not; be required by either House to transmit plans of campaign or orders issued as to the destination of ships, or anything related to the strategy of war, the public knowledge of which getting to the

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[123] This is not to say that there could be no *political* consequences from a decision to ignore such a legislative act. Remember that President Andrew Johnson was impeached by the House for refusing to execute a statute that was subsequently described by the Supreme Court in *Myers v. United States* as "invalid . . . ." See Section V.

[124] The "supremacy clause" of the Constitution provides that laws "made in pursuance" of the Constitution are part of the "supreme law of the land . . . ." U.S. CONST. art. VI. In *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 180 (1803), Chief Justice Marshall interpreted this provision to mean that "a law repugnant to the constitution is void . . . ." Attorney General James Speed wrote in 1865: "The Constitution is the supreme law--a law superior and paramount to every other. If any law be repugnant to the Constitution, it is void; in other words, it is no law. It is the peculiar province and duty of the judiciary department to say what the law is in particular cases. But before such cases arise, and in the absence of authoritative exposition of the law by that department, it is equally the duty of the officer holding the executive power of the Government to determine, for the purposes of his own conduct and action, as well the operation of conflicting laws as to the constitutionality of any one." 11 Op. Att'y Gen. 214 (1865).

[125] A. BARRETT, REAPPRAISING DEFENSE ORGANIZATION 27 (1983). See also, *id.* at 40.

[126] See *supra*, Section V.

[127] Bestor, *Separation of Powers in the Domain of Foreign Affairs,* 4 SEATON HALL L. REV. 527, 661 (1974). Senator Spooner declined invitations to serve as Attorney General from both President McKinley and President Taft. U.S. SENATE, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1737 (Sen. Doc. No. 92-8, 92d Cong., 1st Sess. 1971).

> enemy would defeat the Government and its plans and enure to the benefit of any enemy.[128]

The President, of course, is "Commander-in-Chief" during peacetime as well as wartime, and the same principle would almost certainly permit him to deny operational information to Congress if in his exclusive judgement disclosure might adversely affect U.S. military posture. As a general rule it is desirable for the two branches to cooperate, and for the President to provide Congress with at least some sensitive information (so long as it is properly safeguarded). But should the President decide that a request for operational information might disclose weaknesses that would lessen U.S. deterrence, endanger U.S. armed forces, or possibly provoke an enemy to seek to take advantage of such knowledge, it would almost certainly be within his constitutional power to deny such a request. To the extent that such statutes might be used to circumvent the "executive privilege" of the President to withhold such national security information, they would almost certainly be unconstitutional.

Since in the long run military policies can not succeed without the support of Congress, the President has strong incentives to insure that Congress is kept fully informed on matters within its areas of responsibility. Out of a spirit of comity, it is common practice to go even further, and to apprise key congressional leaders and committees of extremely sensitive operational details. But comity should be the governing principle; with the President realizing that without keeping Congress informed he may not have its support on key initiatives, and congressmen knowing that if such information is not properly handled subsequent requests may be rejected. As already noted, requests for such information as early as the Washington administration were made not to the Secretary of War (much less one of his subordinate civilian officials or a military officer), but to the President.[129] It might be useful to modify the statutes to avoid any inference that congressional access to Department of Defense personnel does not include authority to obtain sensitive operational information against the wishes of the President.[130]

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[128] 41 CONG. REC. 97-98 (1906). Professor Bishop writes: "Congress may not be a safe repository for sensitive information: there can be no guarantee that information coming into the hands of Congress or the whole membership of one of its major committees will long remain secret. Most Congressmen are, of course, quite as trustworthy as most executive officials, but there can be no 'security program' for legislators. There is no assurance, if our democracy is to be maintained, that so large a body of men will not include a percentage, to be expected on statistical grounds, of subversives, alcoholics, psychopaths and other security risks, and no assurance that the seniority system will not place such a security risk in the chairmanship of an important committee. Even legislators of high respectability have been known, in the heat of partisan passion, to place the national interest a very poor second to consideration of faction. If these premises are granted, it follows that, as a practical matter, Congress ought not to be given an absolute right of access to military and diplomatic secrets." Bishop, *The Executive's Right to Privacy*, 66 YALE L. J. 477, 486 (1957).

[129] See *supra*, Section V.

[130] This suggestion is motivated more by a concern for what is *proper*, in terms of constitutional principles, than what is politically *feasible*. It is not suggested that Congress would at this time willingly modify any statute under discussion, and the Commission will perhaps wish to address whether to restrict its observations to proposals with a reasonable likelihood of being adopted, or to leave such political judgments to the recipients of its reports.

Under Article two, Section two, Congress has broad powers to establish new offices within the Executive branch. However, like all other powers, this one is limited in that it must be exercised consistent with the limitations prescribed in other parts of the document. For example, as the Attorney General said in 1855: "No act of Congress, no act even of the President himself, can, by constitutional possibility authorize or create any military officer not subordinate to the President."[131]

Congress also has broad powers with respect to the appointment of officers. Professor Corwin writes:

> [T]he most serious limitations on the appointing power result from the fact that in creating an office, Congress may also stipulate the qualifications of appointees thereto. First and last, legislation of this character has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, political, industrial or regional affiliations, and so on.[132]

Despite these broad powers, they do not extend so far as to permit the Congress to usurp the appointment power itself--which is vested exclusively in the President.[133] A 1948 study of Executive branch reorganization in the *Columbia Law Review* observed:

> The doctrine of separation of powers does place some limits on the extent to which proposals of the [Hoover] Commission on Organizing relevant to methods of operation may be enacted into law. The President has certain constitutional functions, such as the appointing power, and the duty to see that the laws are faithfully executed, which may not be usurped.[134]

In 1873 the Attorney General gave this description of the power of Congress to constrain military appointments and promotions:

> It may therefore be regarded as definitely settled by the practice of the Government that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the constitution expressly confers upon Congress authority to make rules for the government and regulation of the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it may deem proper in regard to making promotions or appointments to fill any and all

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[131] 7 Op. Att'y Gen. 453, 464-65 (1855), quoted in E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 85 (1976).

[132] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 75-76 (1976).

[133] U.S. CONST. art II, sec. 2, cl. 2.

[134] Note, *Reorganization of the Executive Branch*, 58 COL. L. REV. 1211, 1224 (1948).

> vacancies of whatever kind occurring in the Army; provided, of course that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs. [Emphasis added.][135]

Discussing this same issue, Berdahl, in his *War Powers of the Executive in the United States*, writes:

> [C]ongress, under its power "to make rules for the government and regulation of the land and naval forces," may prescribe rules of eligibility governing the appointment and promotion of officers, and in that way limit to a considerable extent the President's power of appointment. It has been held, however, that such rules can prescribe only the mode in which vacancies shall be filled, and hence do not confer upon the officer next in the order of succession any right to the vacant place, nor control the President in his discretionary power to appoint some other individual. [Citations omitted.] Congress can in no way dictate what appointment shall be made; it can only determine how they shall be made and limit somewhat the field of selection by prescribing certain rules. Moreover, the President is *entirely free to select whom he will from among the officers for any particular duty or command, without consulting the Senate and without regard to seniority in rank.* General Pershing was thus chosen to command the American Expeditionary Force in the recent war, altho he was not the ranking officer in the army at the time. *In fact, any question that may arise as to the relative rank of officers in the various branches of the service is understood to be within the power of the President, as Commander-in-Chief, to settle without legislation by or consultation with Congress. [Emphasis added.]*[136]

These limitations have not stopped Congress, on occasion, from trying use its power to set qualifications for office so as to either direct the President to appoint a designated officer to a newly created office, or to narrow the "qualifications" that only one officer would be eligible. For example, on 25 June 1860 Congress passed the Sundry Civil Bill, which included an appropriation of $500,000 to complete the building of the Washington aqueduct. As a result of some effective lobbying by a Colonel Meigs of the Corps of Engineers, the statute expressly provided that the funds were to be expended according to plans and estimates drawn up by this officer. At the urging of the Secretary of War, the President sought guidance from the Attorney General as to the binding nature of this stipulation. The Attorney General replied:

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[135] 14 Op. Att'y Gen. 164 (1873), quoted in 18 *id.* 25 (1884).

[136] C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 126-27 (1921).

> As commander-in-chief of the army it is your right to decide according to your own judgment what officer shall perform any particular duty, and as the supreme executive maginstrate you have power of appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution. . . .
>
> If Congress had really intended to make him independent of you, that purpose could not be accomplished in this indirect manner any more than if it was attempted directly. Congress is vested with the legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution, and no further. . . . You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank.[137]

Another interesting case occurred in 1884. The President had lawfully dismissed Major General John Porter following a conviction by court martial. New evidence suggesting his innocence was then raised, and the President conveined a board of officers to consider and make a recommendation based on that evidence. When the board recommended that General Porter be restored to active duty, the President forwarded its report to the Congress under a cover message which read:

> As I am without power, in the absence of legislation, to act upon the recommendations of the report further than by submitting the same to Congress, the proceedings and conclusions of the board are transmitted for the information of Congress, and such action as in your wisdom shall seem expedient and just.[138]

Congress subsequently passed a private "act for the relief of Fitz John Porter," authorizing the President to nominate, and with Senate consent to appoint, Porter to "the same grade and rank held by him at the time of his dismissal from the Army by sentence of court-martial promulgated January 27, 1853 . . . ."[139] However, Attorney General Brewster promptly advised the President that the bill infringed his appointment power, and was thus unconstitutional:

> Conceding . . . all that is here claimed for Congress under the provision of the Constitution averted to, it does not follow that the right to regulate appointments to offices in the Army can be carried to the designation of particular individuals to fill such offices, without imposing

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[137] 9 Op. Att'y Gen. 468-70 (1860). See also, Meigs, *The Independence of the Departments of Government*, 23 AM. L. REV. 594, 602 (1898).

[138] Quoted in 18 Op. Att'y Gen. 18, 19 (1884).

[139] 8 RICHARDSON, MESSAGES OF THE PRESIDENTS 221, quoted in E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 77 (1976).

> an unconstitutional restriction upon the appointing power. The right of Congress to regulate is itself limited by the necessity of leaving due scope to the appointing power for the exercise of judgment and will in performing its functions, as contemplated by the Constitution.[140]

The bill was therefore vetoed by the President, and the veto was sustained.[141]

One of the more creative legislative efforts to control the appointment power was contained in the 1916 Army Reorganization Bill. The *New York Times* provided this account:

> Another joker in the Army Reorganization bill is very interesting to those who know of the circumstances connected with it. This joker, slipped into the bill behind the closed doors of the Conference Committee, as jokers frequently are, is contained in a paragraph providing for the appointment of Judge Advocates in the reorganized regular army. Probably there never was more peculiar language employed to frame a joker than that which reads this way: "Provided further, That of the vacancies created in the Judge Advocate's Department by this act, one such vacancy, not below the rank of Major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who shall have been for ten years a Judge of the Supreme Court of the Philippine Islands, shall have served for two years as a Captain in the regular or volunteer army, and shall be proficient in the Spanish language and laws."
>
> The one man in the world that this description seems to fit is Judge Adam C. Carson of the Supreme Court of the Philippine Islands. Judge Carson is now in the United States on leave of absence. His home is at Riverton, Va., in the Congressional district of Representative James Hay, Chairman of the House Committee on Military Affairs, and Chairman of the House conferees on the Army Organization bill. . . .
>
> The reader will be grateful to know that Judge Carson got the job.[142]

While on this subject of appointments, it is also worth noting that the Constitution expressly prohibits members of Congress from being appointed concurrently to "civil office under the authority of the United States . . . ."[143] Also, during its confirmation process the Senate is limited to saying "yes" or "no," and may not attach conditions of any kind.[144]

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[140] 18 Op. Att'y Gen. 18, 25-26.

[141] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 77 (1976).

[142] *New York Times*, 20 May 1916, quoted in E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 76-77 n.13 (1976).

[143] U.S. CONST., art. I, sec. 6, cl. 2.

[144] E. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 81 (1976).

As already discussed at some length,[145] there are serious constitutional doubts about the authority of Congress to limit the President's discretion--even if peacetime[146]--to dismiss military officers. In an 1813 debate on the House floor, Congressman George M. Troup, of Georgia, provided this explanation of the relative powers of Congress and the President *vis-à-vis* the dismissal power:

> To Congress was granted the power of raising armies and granting supplies for them; but to the Executive was confided the exclusive control and direction of the armies when raised. To enable him properly to execute this duty, the President had been vested with the most arbitrary powers--the power of dismissing without assigning a cause, and jointly with the military courts, of cashiering, and inflicting on officers other punishments, even unto death. The power then of controlling military movements . . . is not with us, but with the Executive. He may dismiss any officer of the Army and even the Secretary of War, for misconduct; and the power of control, possessed by this House is the power of impeaching the President if he fail in the performance of his duty.[147]

Similarly, Berdahl described the power to dismiss military or naval officers as "one of the prerogatives of the President as Commander in Chief," and quotes "distinguished authority" for the conclusion that it is an "absolute power, tho one that ought to be exercised with great discretion . . . ."[148]

Two related procedural constraints which have already been referenced in various parts of this memorandum are the "presentment" clause and the requirement that legislative acts be bicameral in nature. The former provides a constitutional bar to "legislative veto" mechanisms--which provide that the President may exercise discretion with respect to certain matters delegated by Congress[149]; however, tentative Executive decisions must be reported to Congress and may not take effect if Congress (or a designated element thereof) registers its objection. When the "veto" is vested in something less than the full Congress, it suffers the additional constitutional infirmity of a lack of bicameralism.

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[145] See *supra*, Section V.

[146] While the consequences of denying the President this power may arguably be greater in wartime, as a matter of constitutional principle the distinction is difficult to justify. The President is Commander-in-Chief at all times, and his need to be able to control the military is probably as great when he seeks to deter aggression during peacetime as when he seeks to defeat aggressors during war.

[147] 26 ANNALS OF CONG. 867 (1813), quoted in A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 272 (1976).

[148] C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 128 (1931).

In the landmark case on this issue, *I.N.S. v. Chadha* , which was decided in 1983, the Supreme Court explained:

> Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of this case, we set them out verbatim. Art. I provides:
>
> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* a House of Representatives." Art. I, § 1. (Emphasis added [by Court].)
>
> Every bill which shall have passed the House of Representatives *and* the Senate, *shall*, before in becomes a Law, be presented to the President of the United States; . . ." Art. I, § 7, cl. 2 (Emphasis added [by Court]).
>
> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) *shall* be presented to the President of the United States; and before the Same shall take Effect, *shall* be approved by him, or being disapproved by him, *shall* be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." Art. I, § 7, cl. 3. (Emphasis added [by Court]).
>
> These provisions of Art. I are integral parts of the constitutional design for the separation of powers.[150]

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[149] Although true in theory, in reality it is technically incorrect to state that "legislative veto" mechanisms are limited to controlling powers "delegated by *Congress*." The 1973 War Powers Resolution (87 Stat. 555), for example, apparently seeks to permit the Congress by concurrent resolution to veto a power expressly vested in the President by the Constitution--his Commander-in-Chief authority. Section 5(c) thereof provides in part that "at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." While some observers have suggested that the resolution constitutes a limited delegation of its article I, Section 8, power to "declare war" to the President (which would quite possibly be unconstitutional in this form), that interpretation is inconsistent with the resolution's text. Section 8(d) of the War Powers Resolution states that "Nothing in this joint resolution . . . (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution."

[150] 103 S.Ct. 2764, 2781 (1983).

Discussing bicameralism, the Court noted that--as is the case with the presentment requirement[151]--there were set forth in the Constitution a few actions which might legally be taken only by the House of Representatives (e.g., to initiate impeachment), and others by the Senate (e.g., confirming appointments and ratifying (sic)[152] treaties). The Court reasoned:

> These carefully defined exceptions from presentment and bicameralism underscore the differences between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here.[153]

In his dissenting opinion in the *Chadha* case, Justice White argued that the case "also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'" Specifically, he argued that would include "other congressional review statutes operating on such varied matters as *war powers* and agency rulemaking . . . .[Emphasis added.]"[154] In a concurring opinion, Justice Powell argued that the case "apparently will invalidate every use of the legislative veto."[155] Section one of this memorandum discusses statutes which contain "legislative vetoes."[156] Despite their obvious convenience and efficiency,[157] there can be little doubt but that they have been held unconstitutional by implication in the *Chadha* case.

Related to this is the constitutional restriction against excessive delegations of authority. Article one, Section one, of the Constitution provides: "*All* legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. [Emphasis added.]" The only way in which this provision may be changed is by constitutional amendment. Should Congress pass a statute investing the President with the power to "declare war" this would almost certainly be an excessive delegation, and--if it ever reached the Court[158]--would likely be held to be unconstitutional.[159]

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[151] E.g., the President need not be presented with congressional resolutions approving proposed constitutional amendments (on the theory that an adequate check is provided by the need for approval by the legislatures of three-forths of the several states).

[152] Although the Court said the Senate had the power "to ratify treaties," from a technical legal standpoint this is not accurate. Ratify means "to make valid." Although the President may not ratify a treaty (usually done by exchanging with other parties, or depositing with a central authority, an instrument of ratification) without the consent of two thirds of the Senate (or more technically, two thirds of those present), even after the Senate has given its consent the President retains complete discretion to set the treaty aside.

[153] 103 S.Ct. at 2786-87.

[154] *Id.* at 2792.

[155] *Id.* at 2788.

[156] Such as 10 U.S.C. § 124(a) (1982), empowering the President to "transfer, reassign, consolidat[e], or abolish" any "function, power, or duty vested in the Department of Defense by law" following a 30 day notice if their is no objection by the Armed Services Committee of either House of Congress. If a committee does object, it has 40 additional days to secure passage of a simple (one house) resolution of veto, or the change may proceed. During periods of "hostilities or an immediate threat of hostilities," Section (b) of this statute provides that the President may temporarily make such changes.

[157] As Chief Justice Burger said for the Court in *Chadha*, "the Framers ranked other values higher than efficiency." 103 S.Ct. at 2788.

The same principle would arguably apply to a congressional delegation of ultimate authority to "make rules for the government" of the military,[160] although the President's special constitutional responsibilities with respect to military affairs would probably support a ***substantial*** concurrent rulemaking authority in the absence of legislative preemption. But as a result of virtually uniform historic practice, and consistent judicial opinion, it is clear that Congress possesses far greater power to delegate broadly to the President in the related national security fields of foreign and military affairs than in domestic affairs.

In a study that deserves to be regarded as a classic in the field, Professor Abraham Sofaer has written of the practice during the administration of George Washington:

> Scholars have commonly assumed that Congress has conferred far broader discretion upon Presidents in recent than in earlier periods of the nation's history. This assumption is far from accurate. Congress made many very broad delegations during the first eight years under the Constitution. Several occurred without debate as to their propriety, and many involved subjects unrelated or only tangentially related to the war powers. But broad delegations also were made, after revealing debate, on foreign affairs and military issues calling for highly sensitive judgments, including whether to use the armed forces against Indians or foreign nations. . . .
>
> In sum, while Congress retained considerable control over establishing post roads, and attempted for a brief time to control military expenditures, Congress conferred broad discretion over important decisions respecting use of the military and the conduct of foreign affairs."[161]

Sofaer makes clear that the experience under Washington was no exception to subsequent practice during the earliest years of our history:

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[158] There are "avoidance" mechanisms (such as the political question doctrine) which make it difficult for matters of this sort to obtain judicial resolution even if the "case or controversy" (art. III, sec. 2) roadblocks of "ripeness" and "mootness" can be hurdled.

[159] But see, E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 at 494 n.142 (1984). This is not to say that Congress may not pass a joint resolution conditionally authorizing the President to use force in response to an identified problem, even if substantial discretion were permitted. Obviously, as already discussed in Section V, this discussion is irrelevant to the President's use of his independent constitutional power to use military force--in response to foreign attack or for other purposes. If the President acts under his own constitutional authority, the question of legislative delegation does not arise.

[160] In 1853 Attorney General Caleb Cushing suggested that the power of Congress to "delegate to others the power to make a law" in the form of a Navy code of regulations "might well be questioned . . . ." 6 Op. Att'y Gen. 11, 12 (1853).

[161] A. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 74, 77 (1976).

> [W]hile Congress did deny the President [Jefferson] some part of the broad powers he sought to enforce the embargo laws, as well as the power to increase the army, or the "Peace Establishment," in general the Republican majority adopted the practice of prior Congresses, and granted broad discretion. Thus, for example, the President was delegated the power both to increase the number of and discharge seamen, to discharge troops, and either to arm or leave unarmed all but four of the nation's naval vessels. . . .
>
> On several occasions during the presidencies of Madison, Monroe and Adams, Congressmen protested against proposed delegations to the executive of broad discretionary powers; sometimes these delegations were narrowed or refused. In general, however, broad delegations were frequent, and usually legislated without any recorded protest. Broad delegations were most common, in fact, in the areas of foreign and military affairs . . . ."[162]

The Supreme Court has consistently permitted far broader delegations of legislative powers in what Locke characterized as the *Federative* areas of war and national defense. For example, in the landmark case of *United States v. Curtiss-Wright Export Corp.*, the Court said in 1936:

> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action--or, indeed, whether he shall act at all--may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this Court said in *Mackenzie v. Hare*, 239 U.S. 299, 311, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers*." (Itaics supplied.) . . .
>
> Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a

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[162] *Id.* at 175, 234. "Delegations respecting the military were especially extensive" during the [first] Adams Administration. *Id.* at 132.

> standard far more general than that which has always been considered requisite with regard to domestic affairs.[163]

In the 1948 case of *Lichter v. United States*, the Court observed that "[i]n peace or in war it is essential that the Constitution be scrupulously obeyed, and particularly that the respective branches of the Government keep within the powers assigned to each by the Constitution."[164] But in discussing the problem of delegating powers related to war, the Court added: "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."[165]

While the delegation problem can not be ignored, given the wide scope of delegation the Court has traditionally permitted in this area it is probable that the political constraints of a jealous Congress will pull in the reins of delegated powers long before the constitutional limits are reached. Nevertheless, any comprehensive discussion of restructuring defense organization should be made with this constraint in mind.

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[163] 299 U.S. 304, 321-22, 324 (1936). Similarly, in *Zemel v. Rusk*, the Court explained in 1965: "It is important to bear in mind . . . that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress--in giving the Executive authority over matters of foreign affairs--must of necessity paint with a brush broader than that it customarily wields in domestic areas." 381 U.S. 1, 17 (1965).

[164] 343 U.S. 742, 779 (1948).

[165] *Id.* at 785. See also, *Hirabayashi v. United States*, 320 U.S. 81, 104 (1943).

[illegible] for [illegible] power over [illegible] though been considered [illegible]

[illegible] Congress [illegible] Court [illegible]

[illegible]

[illegible] 299 U.S. 304, 321-22 (1936) [illegible] It is important to [illegible] [illegible] which is domestic [illegible]

[illegible] See also, Hirabayashi v. United States, 320 U.S. 81, 104 (1943) [illegible]

VII.

Conclusion

A. The History and Present Legal Structure of Defense Organization

An important nineteenth century struggle for authority over military operations between various civilian Secretaries of War and Army generals was decisively won for the civilian Secretaries with the passage of an Act of 1903 making the new Army Chief of Staff subject to the command of the Secretary of War. There has been little serious challenge to the principle of civilian control since that time. Today civilian control of the military is engrained in the statutory legal framework of defense organization as well as in the American military tradition.

Since World War II and the passage of the National Security Act of 1947 the central issues of defense organization have been establishing a Department of Defense under centralized direction of a legally powerful Secretary of Defense, accommodating the needs of strong, unified combatant commands with the traditions and efficiencies of specialized multi-service functions, and managing the complex planning and budgeting process and technological challenges of a modern defense establishment capable of meeting the Nation's security needs. The first of these goals has been met in the series of amendments to the 1947 Act. No one can carefully review the history of amendments to that Act without realizing the virtually plenary authority of the Secretary of Defense over the Department of Defense and all of its components. Similarly, the post-war historical trend has been toward enhanced authority for unified commands, the Joint Chiefs and, to a lesser extent, the Chairman of the Joint Chiefs.

From a legal standpoint, the existing constitutional, statutory, and regulatory framework supports current defense organization practices. Nevertheless, there are a number of significant points arising from a legal analysis that might be considered by the Commission.[1] These include:

(1) it might be useful to provide more general statutory authority--to match the probable constitutional authority--for the President and the Secretary of Defense to make general changes to the defense organization during hostilities or imminent threat of hostilities;

(2) a major statutory provision concerning the authority of the Secretary of Defense to transfer combatant functions, that contains a one-house veto provision,

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[1] This is not to suggest that these are the only legal points worthy of attention in formulating recommendations concerning defense organization or that broader policy changes not rooted in legal ambiguity should be precluded from consideration.

is almost certainly unconstitutional, at least in part, under the Supreme Court decision in *I.N.S. v. Chadha*;

(3) it might be useful to strengthen the statutory charter of the Joint Chiefs with respect to their command function of strategic direction over operational commands (subject, of course, to the civilian direction of the President and the Secretary of Defense);

(4) it might be useful to provide the Chairman of the Joint Chiefs a clearer statutory role in the operational chain of command for execution of the Single Integrated Operational Plan and other time-sensitive operations; and

(5) it might be useful to seek to further clarify through statute, DOD Directive, or more informal means, specific functions that in the interest of effective unified combatant command should be considered "operational" as opposed to "administrative."

Changes in defense organization may be made by statute, or unless inconsistent with a constitutionally valid statute, by Executive Order or Department of Defense Directive. The Secretary of Defense has substantial authority to regulate and direct the activities of the Defense Department and all its components.

B. The Constitutional Division of Power Between Congress and the President and the Authority to Alter Defense Organizations

The Founding Fathers intended the President, as Commander-in-Chief, to have primary responsibility for national security matters. Control over military operations was vested exclusively in the President. However, to guard against abuse, the Congress was given several key checks over Executive action. Most importantly, the President was prevented from initiating a "war" against another State without the formal consent of Congress. In addition, the President was entirely dependent upon Congress for the existence of a military force to command, and it was specificially provided that appropriations for this purpose could not be made at greater than two year intervals. (In addition to being a check against Executive abuse, this was also consistent with Congress's other responsibilities for resource allocation.)

Congress was expressly given the power to "make rules for the government and regulation of the land and naval forces," and under this power has broad power to dictate the organizational structure of the Defense establishment. However, historically Congress has generally permitted the President substantial discretion in defense organization; first by seeking guidance as to how the military forces should be organized, and secondly by permitting the President to modify the statutory organization during time of war.

Both the President and the Secretary of Defense have substantial authority--some of it based in the President's position as Commander-in-Chief, but most expressly delegated from Congress by statute--to reorganize the defense establishment. It is likely that most proposed modifications could be implemented without seeking additional legislation. However, as a policy matter, it is important that any such effort not be undertaken without full and candid consultation with key elements of the Congress. In the first place, a total disregard for congressional thinking would run a substantial risk of allienating a constitutional partner whose support is essential for military policies to succeed. To ignore Congress would undercut the spirit of bipartisan cooperation which must be the basis of a successful relationship between the political branches. More pragmatically, since Congress possesses the power to withdraw much of the discretion now exercised by the Executive, to bypass the Legislative branch increases the likelihood that any new reorganization will be blocked in whole or part through amendments to the Defense Authorization Bill or other legislation--perhaps without the benefit of a sympathetic committee hearing.

At the same time, it is important in structuring any reorganization to keep in mind the special responsibilities the Commander-in-Chief has for the conduct of military operations--and therefore especially for the *operational* side of the chain of command. The courts have noted that the power of Congress to "raise and support armies" does not extend so far as to interfere with the President's power as Commander-in-Chief. When Congress seeks to impose an operational chain of command on the President against his wishes, it operates at the far limits of its power at best.

Furthermore, the need for Executive flexibility in this area is even greater today than it was in World War II. While many statutes which constrain the President in this area include provisions giving the President far greater flexibility (if not total discretion) during wartime, this flexibility may be more illusory than real in an era of supersonic nuclear missiles and "come as you are" war. Both because of the uncertainty of its constitutional power to regulate the command chain, and because of the strong prudential considerations which support the President having a command structure with which he is comfortable for the purpose of exercising responsibilities that the Constitution has denied to Congress, flexibility ought to be a cardinal element of any statutory plan to structure the operational chain of command. At minimum, statutory constraints probably ought to include a provision authorizing the President to make adjustments if in his judgement to do so is necessary for the safeguarding of the security of the nation.

Constitutional concerns have also been raised about several provisions of existing law-- such as the requirement that the President obtain the approval of a board of military officers before dismissing an officer during peacetime, and the provisions guaranteeing congressional access to senior Department of Defense officials--which, while perhaps not central to the Commission's mandate, may warrant further inquiry.